THE LAW

OF

REAL ESTATE AGENCY;

HAVING A GENERAL APPLICATION TO

PRINCIPALS, AGENTS AND THIRD PARTIES,

AS DEDUCED FROM

THE DECISIONS OF THE COURTS.

BY

NATHAN T. FITCH,

COUNSELOR AT LAW.

CHICAGO:
E. B. MYERS & COMPANY.
1881.

PREFACE.

THIS work is designed principally for the use of Real Estate Agents, and its preparation was suggested by the want of any work especially devoted to the law of agency as applied to real estate transactions. Among the numerous publications intended to serve as guides, or manuals, for popular use, there are some which incidentally touch upon many of the subjects herein discussed, but in such a manner as rather to mislead than aid the reader. This is not because of the incorrectness of the doctrines laid down, if considered as absolute propositions of law, and where properly applied; but for the reason that "for the want of a due discrimination in this respect, very erroneous inferences are frequently deduced from the reported decisions, which decisions, however correct with reference to the class of agents embraced therein, will often be found to mislead, unless taken with the implied and tacit qualifications applicable to that peculiar class of agency."

The business of the real estate agent is of modern growth. It has developed since most of the text-books on agency were written, and adjudications growing out of the relation which the real estate agent sustains to his principal and third persons have not been fully formulated.

Formerly, when one desired to buy or sell a house or

CONTENTS.

CHAPTER I.

INTRODUCTORY—AGENCY IN GENERAL 5

CHAPTER II.

THE REAL ESTATE AGENT—HIS EMPLOYMENT AND THE RIGHTS AND OBLIGATIONS RESULTING THEREFROM.... 14

CHAPTER III.

OF THE AUTHORITY OF THE REAL ESTATE AGENT—ITS EXTENT AND DURATION, RATIFICATION AND REVOCATION..... 32

CHAPTER IV.

OF REPRESENTATIONS 59

CHAPTER V.

AS TO THE ESSENTIALS OF A BINDING CONTRACT FOR THE SALE OF LAND, ETC., WITHIN THE STATUTE OF FRAUDS 76

CHAPTER VI.

1. OF THE LIABILITY OF THE AGENT IN CONNECTION WITH THE CONTRACT. 2. OF THE MANNER OF EXECUTING CONTRACTS 88

CHAPTER VII.

COMMISSIONS AND DEPOSIT MONEY..... 101

CHAPTER VIII.

CONCLUSION... 133

APPENDIX..... 147

INDEX TO CASES CITED..... 183

GENERAL INDEX..... 203

LAW OF REAL ESTATE AGENCY.

CHAPTER I.

INTRODUCTORY.

In order to the clearer apprehension of the reason of the several legal and equitable doctrines to be considered in connection with the business of Real Estate Agents, it is important to understand, at the outset, some of the more familiar principles applying to agents in general.

Let us then, first, notice briefly—between whom the relation of principal and agent may be established—the different kinds of agency—how an agency may be constituted—the nature and extent of the agent's authority, and of his duties and obligations in general: the consideration of the particular rights, duties and obligations of Real Estate Agents, as such, will then more naturally follow; and will form the subject of the succeeding chapters.

First—Between whom the relation of principal and agent may be established.

Whoever, as owner, or in his own right, may rightfully do a thing, may do it by another. But as the act of appointment involves an exercise of the judgment, it fol-

lows that idiots, lunatics, and other persons of unsound mind—at least after being judicially so found—are incapable of appointing an agent. So persons who are incapable at law of acting in their own right, as wards, spendthrifts over whose estate a conservator has been appointed, etc., cannot appoint an agent to act for them.

A like inability, at common law, applies to minors and married women, except under special circumstances. Where, however, a married woman has by law the rights of a *feme sole* with respect to her separate property, she probably can appoint an agent to dispose of it, and that even without the consent of her husband.[1]

On the other hand, the exceptions to the rule are so limited, that it may be stated generally, that a person who has sufficient capacity to act for himself, may act for another.[2] Yet this general statement must be taken with the qualification that a person cannot take upon himself, at the same time, incompatible duties and characters, or become an agent in a transaction where he has an adverse interest or employment.[3]

Second—The different kinds of agency.

Agencies are of two kinds—General and Special. A General Agent is one whom a man puts in his place to transact all of his business of a particular kind, or at a particular place, within the line of the agent's business. A Special Agent is one whom a man employs to do some particular act. A person authorized by his principal to

[1] Hogan v. Hogan, 89 Ill. 429; Greenleaf v. Beebee, 80 Ill. 520; Hawkins v. Taylor, 7 Reporter 105.

[2] Lea v. Bringier, 19 La. Ann. 197.

[3] Story on Agency, sec. 9.

sell generally any or all of his property, would be a general agent in that behalf, and that, although such agent should be prohibited from signing or executing the instruments necessary to complete the sale. On the other hand, a person who is authorized by his principal to buy or sell a particular property only, even should such authority extend to the right to execute all necessary papers, and do all other acts necessary to fully consummate the transaction, is a Special Agent only. Several instances of special agency or employment do not constitute a general agency.[1]

Whether, however, the agency be a general or special one, it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency.[2]

Under the general name of Agents are included Brokers, Factors, Auctioneers, Attorneys-at-Law, Attorneys-in-Fact, etc. A Broker is generally spoken of in the books as a middle-man, or medium, through whom negotiations are made, for the purchase or sale of property, on behalf and in the name of his principal, who, if the seller, himself retains possession of the property pending the negotiation. A Factor, on the other hand, is entrusted with the possession and control of the property, and frequently acts in his own name, though on behalf of his principal, and is often called upon for the exercise of his individual judgment and discretion. Attorneys-

[1] Angle v. Minn. etc. R. R. Co. 9 Iowa 487.

[2] Sanford v. Handy, 23 Wend. 260; McAlpin v. Cassiday, 17 Texas 449; Geylin v. DeVilleroy, 2 Houst. 311; Story on Agency, sec. 73–85.

in-Fact are so called in contradistinction to Attorneys-at-Law, and may include all other agents except the latter. An Attorney-in-Fact is one who has authority given him to act in the place and stead of him by whom he is delegated, in private contracts and agreements; which authority must be by instrument under seal.[1]

Third—How an agency may be constituted.

An agency may be created by the express words or acts of the principal, as by some written instrument, such as a written request, a power of attorney, letters of instructions, or memorandum for the guidance of the agent; or, by verbal request or employment; or, it may be implied from the recognition or adoption of, or acquiescence in, the acts of the agent on the part of the principal.

When, however, any act of agency is required to be done in the name of the principal, *under seal*, the authority to do the act must itself be conferred by an instrument under seal; and in such case the writing giving the power must possess the same requisites and observe the same solemnities as are necessary in the instrument empowered to be executed.[2] Thus, where the instrument to be executed by the agent requires two witnesses, there must be the same number to the power of attorney.[3]

But the rule that an agent cannot, without an authority from his principal, under seal, bind the latter by an instrument under seal, does not, ordinarily, prevent his making an executory contract, not under seal, for the

[1] Bacon's Abr. (Attorney). 203; 2 Kent's Comm. 614.
[2] Clark v. Graham, 6 Wheat. 577; Butterfield v. Beall, 3 Ind.
[3] Gage v. Gage, 30 N. H. 420.

sale of lands, although it would be necessary that the conveyance of the land should be by deed; thus, the authority of an agent to contract that his principal *will convey* need not (in the absence of any statutory provision to the contrary) be under seal, or even in writing.[1] In other words, if the acts to be performed by the agent could not be effectually performed by the principal except by an instrument under seal, the authority to the agent should be by writing under seal; if they do not require the seal of the principal when performed by him, the authority to the agent need not be under seal, nor even in writing at common law; and that, although to make the contract binding on the principal it must be in writing and signed by him[2];—the effect of the statutory provisions above referred to will be considered hereafter.

Fourth — The nature and extent of the agent's authority.

These may be determined by stipulation, or express instructions; or, they may be implied from the circumstances of the particular case. But there is a distinction in the measure of this authority, as between the principal and his agent, on the one hand, and between the principal and third persons dealing through such agent, on the other hand. In a general agency all the authority within its general scope will be implied, and third

[1] Riley v. Minor, 29 Mo. 439; Collins v. Smith, 18 Ill. 160; Watson v. Sherman, 84 Ill. 263.

[2] Stackpole v. Arnold, 11 Mass. 27; Small v. Owings, 1 Md. Ch. 363; 1 Pars. on Cont. 47.

NOTE.—For a modification of this doctrine, where one partner executed a lease as the agent of the other *vide* Peine v. Weber, 47 Ill. 41.

persons may assume that any acts done by the agent, which are ordinarily necessary in the transaction of such business, or within its apparent scope, are authorized by the principal; and such acts will bind the principal as to such persons. In a special agency, persons dealing with the agent must inform themselves as to the nature and extent of his authority, and the principal will not be responsible for any act of the agent outside of such authority.[1] If the authority of the agent is contained in a written instrument, any one dealing with him with notice of the fact, will be bound by any limitations contained in it; and his only safety in dealing with such agent, is to ascertain his authority as limited by the instrument; since if he makes a contract which the agent is not authorized to enter into, he can look only to the agent for redress in case of non-performance. He will not, however, be bound to look beyond the written authority, but may rely on it, even though the principal may have given the agent secret instructions or limitations: this is on the principle that when one clothes another with powers calculated to induce innocent third persons to believe the agent had due authority to act for him, he is bound by any acts of the agent within the apparent and natural scope of the authority.[2] And the authority once ascertained, may, in the absence of any express limitations, be assumed to include any acts ordinarily necessary in the transaction of the business.[3] In all cases of

[1] Duncan v. Niles, 22 Ill. 532; Skinner v. Dayton, 5 John's Ch. 351; Morris v. Ruddy, 20 N. J. Eq. 236.

[2] Story on Ag. sec. 127–443; St. Louis, etc., Packet Co. v. Parker, 59 Ill. 23; Walsh v. Hartford Fire Ins. Co. 73 N. Y. 5.

[3] Nixon v. Palmer, 8 N. Y. 398.

agency, whether general or special, express or implied, if the power actually given is one which is accompanied by incidental powers, which are implied in its exercise, the secret limitations by the principal of their exercise will not bind third persons who have innocently and in good faith entered into transactions relying upon such authority; even though the agent has acted in violation of his secret instructions, or in fraud of the power given him.[1] So also, acts of the agent performed subsequent to the determination of the agency, have been held to bind the principal, in favor of third persons who had no notice of such determination.[2] As between the principal and agent, however, the latter is bound by the power actually given him; and if this be limited in any manner, when, but for the limitation, a general or other authority would be implied, he is responsible to the principal for exceeding it.

If two agents are appointed with equal authority to act for the principal, the right is not exclusive in either, but any act done by either of them within the scope of his authority will conclude the other to that extent.[3]

Where an authority is given to two or more conjointly to do an act, all must concur in doing it.[4]

An Attorney-in-Fact can only act within the strict letter of his authority, for the purpose and in the manner prescribed;[5] and where the agent, in executing a contract, professes to do so by virtue of a written power,

[1] 1 Pars. on Cont. 44; Story on Ag. sec. 26; Young v. Wright, 4 Wis. 144.

[2] Murphy v. Ottenheimer, 84 Ill. 39.

[3] Cushman v. Glover, 11 Ill. 600; Glenn v. Davidson, 37 Md. 365; Hatch v. Coddington, 5 Otto 48.

[4] Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180.

[5] Chase v. Dana, 44 Ill. 262.

as, where he signs "A. B. by procuration, C. D.," or, "A. B. by C. D. his Attorney-in-Fact,"—such signature is notice to a party dealing with him, that the authority is in writing. And he must see that it warrants the agent in making the contract.[1]

An agent cannot ordinarily delegate his authority,[2] unless the power delegated is merely mechanical or ministerial.[3] Thus he may authorize his clerk, or other person, to make and sign a memorandum of a contract in his presence, since this act on their part would be but ministerial.[4] But the application of this rule can only be invoked by the *principal*, when sought to be charged by the act of the sub-agent, and its protection is personal to the principal.[5] And even where applicable, if the principal afterwards adopts the act of the sub-agent he cannot avail himself of the objections.[6]

Fifth—Of the duties and obligations of agents in general.

The relation existing between the principal and his agent is one of trust and confidence, and as a consequence the agent is bound to the exercise of due care and diligence in the performance of the duty assumed: and as the principal, by the contract of employment, has bar-

[1] Exch. Bank v. Monteith, 26 N. Y. 515; Towle v. Leavitt, 3 Foster 360.

[2] Cushman v. Glover, 11 Ill. 600; Eldridge v. Holway, 18 Ill. 445; Bocock v. Pavey, 8 Ohio St. 270; 1 Sugden on Powers, 222.

[3] Com. Bank v. Norton, 1 Hill (N. Y.) 501; Grinnell v. Buchanan, 1 Daly (N. Y.) 538; Joor v. Sullivan, 5 La. An. 177; Eldridge v. Holway, 18 Ill. 445.

[4] Williams v. Wood, 16 Md. 220.

[5] Harralson v. Stein, 50 Ala. 347.

[6] Grady v. Am. Cent. Ins. Co., 60 Mo. 116.

gained for the skill, ability and zeal of the agent, for his own benefit, it follows that the agent cannot himself, make any incidental profit out of the subject-matter of the agency, but must act with a sole regard to the interests of his principal.[1]

This summary mention of some of the doctrines relating to agency in general, will serve our present purpose. Let us next proceed to the consideration of the rights, duties, liabilities and obligations of Real Estate Agents, as such; in treating of which the most convenient way perhaps will be to follow the course which a transaction in which the agent is employed assumes in ordinary practice: commencing with his employment, and following the negotiation through to its final consummation, and discussing the questions involved, as they would naturally arise in the progress of the business, rather than in what might be deemed the more strictly logical order of them.

[1] Merryman v. David 31 Ill. 404; Kerfoot v. Hyman, 52 Ill. 512; Cottom v. Holliday, 59 Ill. 176; Ely v. Hanford, 65 Ill. 267.

CHAPTER II.

THE REAL ESTATE AGENT.

OF HIS EMPLOYMENT AND THE RIGHTS AND OBLIGATIONS RESULTING THEREFROM.

A real estate agent, may, for the sake of convenience, be said to belong to the class of agents called Brokers; and his agency is usually, though not always, a special as distinguished from a general one.

His business is to conduct negotiations for the purchase or sale of real estate, or of some interest therein, on behalf of his employer, for a compensation, which latter is generally in the nature of a commission on the amount to be paid for the property forming the subject-matter of the agency. The management of estates, including renting, the payment of taxes upon, and exercising a supervision over them, also falls within the province of the real estate agent.

The business of real estate agents, in connection with the purchase and sale of property, has been of recent growth compared with that of agents devoted to the sale and transfer of personal property. Much of the law, therefore, relating to brokers when regarded as merely instruments or go-betweens in a negotiation, is not entirely applicable to real estate agents, as their business is now conducted, and where they are frequently clothed with discretionary powers. So, on the other hand,

where the agent is acting merely as a broker in the restricted sense mentioned, it is obvious that the doctrines applying to agents in general, must have some qualification; though it will be found that the extent of such qualification is more limited than might be assumed, so jealous is the law of the interests of parties, who, by the exigencies of modern trade and civilization are obliged to entrust their affairs into the hands of others. With this admonitory explanation let us resume the path we had marked out.

It is not necessary that the employment should be in writing. The leaving a description of property at the office of the broker by the owner or his agent, with a request to sell it, on terms and at a price designated, is a sufficient employment. Where the employment is not by the owner in person, but through a third person, the broker should see to it that such person was authorized by the owner thus to employ him, and it is not safe to rely upon any presumed agency. Thus, although a wife has an implied authority to act for and bind her husband as his agent, in some instances, this is not one of them.

Nor is it *necessary* that an agreement should be made as to commissions, since if an owner entrusts his property for sale with a person whose ordinary and known business it is to sell such property on commission, the law presumes, in the absence of any agreement to the contrary, that the usual commission or compensation is to be paid for any service rendered;[1] nevertheless, it is always advisable that the rate of commission should be agreed upon.

Dyer v. Sutherland, 75 Ill. 583; Harrison v. Long, 4 Dessau (S. C.) 110.

To entitle the broker to commission, there must have been either an actual employment, express or implied,[1] or, which is the same thing in effect, an adoption or ratification of the acts of the broker; or else there must have been an appropriation by the principal of the services of the broker, under such circumstances as would render the withholding of remuneration therefor inequitable.[2] Thus, where a broker, meeting the owner of a certain property, inquired of him regarding it, and the owner said he would sell the property so as to net him $20,000, and that if the broker could sell it for $20,500 he might have the excess. Some months afterward G. went to the owner, stating that he had been sent by the broker, and bought the property of the owner for $19,500. In a suit brought by the broker against the owner, for commission on the sale, on the ground that the former had in fact furnished the customer and been instrumental in effecting the sale, the court held that there was no employment of the broker, but that he was merely authorized to sell the property if he could net the $20,000 to the owner, and get enough over that sum to pay himself for his services.

If the owner had *employed* the broker to sell the property, and had even fixed the price at $20,000, below

[1] Earp v. Cummings, 54 Pa. St. 394. And a power of attorney is not conclusive upon the question of the agent's commission, since it is not supposed to set forth the terms of the employment. O'Sullivan v. Roberts, 42 N. Y. Sup. Ct. 282. Where a sub-agent is employed by the agent, the former must look to the agent for his compensation, and has no claim upon the principal, unless the contract between the agent and the principal contemplated or provides for the employment of the sub-agent.

[2] Atwater v. Lockwood, 39 Conn. 45.

[3] Rees v. Spruance, 45 Ill. 308.

which the broker could not sell it, and then had himself sold it to a purchaser furnished by the broker, at a less price, the broker would nevertheless have been entitled to commission,[1] but in the case cited, the right of the broker to compensation was by agreement, conditioned on the property being sold for more than $20,000, and was in the nature of a special contract to that effect; if, indeed, the arrangement amounted to a contract at all, or was more than a mere license or privilege to sell. We have seen that in the case of an actual employment of the broker by the owner, the law implies a promise on the part of the owner to remunerate him for the services rendered, pursuant to the employment; but in the case of a mere license to sell, or of a special contract like the above mentioned, the labor performed is as to the owner gratuitous, unless a sale is effected on the terms agreed upon, and the broker assumes the risk of receiving no compensation therefor by making the same dependent on his success. It is of course competent for the owner and broker to agree that the latter shall have no compensation unless he should effect a sale at the price limited, and the broker would be bound by such contract;[2] but that would be quite a different case from that of an express employment without such special agreement as to the compensation, even though in both cases a limit should be fixed below which the broker could not sell. The difference is this, that in the one case the broker is debarred by his own agreement from claiming compensation, unless the price named is realized; whilst in the

[1] Lawrence v. Atwood, 1 Bradw. 217.

[2] Hinds v. Henry, 36 N. J. L. 328; Hugerford v. Hicks, 39 Conn. 259.

other case, the realization of the price named was not a condition of the employment, but only a limitation of the broker's authority.[1] If the broker employed to find a purchaser furnishes one, and the owner sees fit to accept from him a price less than that limited, this would be availing himself of the broker's services. It was not incumbent on the owner to accept the lesser sum, but if he does so, he cannot turn around and repudiate the employment, while appropriating to himself the fruits of that employment.[2] And although where the broker, by agreeing that unless the full price named is realized he will claim no compensation, has voluntarily incorporated into the contract of employment a condition, on the performance of which he has made his right to compensation to depend, yet, even in such case, if the broker can prove that the purchaser was ready and willing to pay the price limited, and that the principal knew the fact, the latter would not be allowed to avoid the broker's claim for commission by voluntarily selling to the purchaser for a less sum than that fixed ;[3] although such attempts are frequently made, especially where the property is a valuable one, and the commission that would accrue on the sale a sum so considerable as to render some slight concession from the price fixed a matter of advantage in the end to the seller, by eluding under color of such concession the broker's claim for commission ; but such an artifice is a fraud on the broker, and will not be

[1] O'Sullivan v. Roberts, 42 N. Y. Sup. Ct. 282.

[2] Rees v. Spruance, 45 Ill. 308; Gillett v. Corum, 7 Kans. 156; Shepherd v. Hedden, 5 Dutch. 334; Ludlow v. Carman, 2 Hilt. 107; Bash et al. v. Hill et al. 62 Ill. 216.

[3] Briggs v. Rowe, 1 Abb. (N. Y.) App. 189.

tolerated either in law or equity.[1] The case of a mere right or privilege to a broker to sell property for what sum he can get, paying to the owner a net sum therefor, does not involve any such principles. Such an arrangement, if a verbal one, at any rate, is of no binding force on either party thereto, and at best amounts to but an option to the broker to buy of the owner the property at the price named,[2] and in any sale which the broker may make under such arrangement he would as to the purchaser be himself the seller, and not the agent of the owner.[3]

Owners of property often leave it for sale with several different brokers at the same time. In such cases the several brokers all have a concurrent authority to sell, but the sale by one of them, with the knowledge of the others, puts an end to the agency of the others by removing the subject-matter of the agency; since they can have no further power than their principal has; and he having, by his agent, once sold the property to one person, cannot rightfully sell it again to another.[4] But if the owner has agreed that the broker should have the agency for a certain period to sell a piece of property at a price fixed, and the broker procures a purchaser within that time, ready to buy at the price, his employment is so far continued that he is entitled to his commission, although it turns out that the owner has already, without the agent's knowledge, sold the property to another pur-

[1] Briggs v. Rowe (*ante*).

[2] Perkins v. Hadsell, 50 Ill. 216.

[3] NOTE.—Reference is not here had to cases where the business is to be done in the name of the owner, or where the excess is to be the measure of the broker's compensation.

[4] Cushman v. Glover, 11 Ill. 600.

chaser, through another broker.[1] The same rule, so far as the broker's right to commission is concerned, it is conceived, should apply where the property is also in the hands of other brokers, and during the original term of employment, the broker, without knowledge of the sale, has procured a purchaser ready and willing to buy at the price fixed; since it was the duty of the owner, on the sale being made, to notify the broker.[2]

Cases sometimes arise in which, as already suggested, there may be no actual employment of the broker by the owner, yet in which he may become entitled to compensation. Thus, where a broker, knowing that an owner has certain property for sale, knows also a person who would purchase the property if he knew it was for sale, and the broker is known to the owner as such, and the broker sends the purchaser to the owner with a letter of introduction, stating the object of the would-be purchaser, etc., and that if a sale is effected to him, the broker will charge and claim from the owner the usual commission. Here there is no original employment, nor indeed any employment, of the broker; yet if the owner sells to the customer so furnished him, the law implies a promise on his part to pay the commission; and even if the broker had omitted to state that he should charge a commission, if there were no circumstances indicating that the services of the broker were rendered gratuitously, it might still be a question whether, in view of the known character of the broker's business, there was not an agreement for compensation implied in the use of the broker's instru-

[1] Moses v. Bierling, 31 N. Y. 462.

[2] *Vide* Bash v. Hill, 62 Ill. 216.

mentality.[1] But it is not intended to anticipate questions regarding the right of the broker to commissions, further than it is necessary to refer to them in connection with what has been said respecting the necessity of his employment, as a condition to compensation.

Assuming the broker to have been employed by the owner to sell a certain property, his next step is to find a purchaser acceptable to the owner, at the price and on the terms designated.

The qualification that the purchaser must be acceptable to the owner, itself requires some qualification, in consequence of the difference between the obligations arising from the employment as between the principal and his broker, on the one hand, and the principal and the purchaser on the other hand. It is apparent, from the relations of trust and confidence existing between them, that the broker should faithfully consult the interests of his principal, and not knowingly lend himself to a transaction tending to his detriment; that not only the express instructions, but the known wishes of his principal should guide the broker; and that any information on his part respecting the subject-matter of the agency, which might influence the judgment of his principal, should be communicated to him,[2] or, at least, be not suffered to operate to his prejudice.

The observance of these simple rules of ethics, no less than of law, will prevent most of the questions likely to arise in this connection; and in the application of these rules we will find the limitation of the doctrine that the

[1] Dyer v. Sutherland, 75 Ill. 583.

[2] 1 Story's Eq. Jur. sec. 316a.

proposed purchaser must be acceptable to the owner, as between the principal and his agent. Thus, while if no limitation in this respect has been imposed by the owner, the fact that the buyer is personally obnoxious or objectionable to him would afford no valid excuse to the owner for refusing to consummate the negotiation. Yet, if such proposed buyer is one to whom the principal has objected, or, if the agent otherwise knows, or has good reason to believe that he will be unsatisfactory to the principal; and notwithstanding such fact, the agent negotiates the sale without consulting his principal, and the latter refuses to consummate the negotiation on the ground that the purchaser is not satisfactory to him, the agent would have no claim for compensation for his services, although the contract might be binding in favor of the purchaser.

So if the proposed purchaser intends to devote the property to purposes which would necessarily impair the value of adjacent land of the principal, the latter has a right to take this fact into consideration before concluding the sale; and the right to consider would involve the right to make or decline the sale, so that if the agent, with knowledge of such intention, which he conceals from his principal, negotiates a sale to such purchaser, the owner would, on the discovery of the facts, be justified, as between himself and the agent at least, in refusing to carry out the transaction. Other illustrations will readily suggest themselves, from which it will be seen that the case of the real estate broker is somewhat different from that of a commercial broker, and that this difference results from the difference in the subject-matter of the

respective agencies. In the sale of stocks, bonds, or other personal property, it can ordinarily make no sort of difference to the seller what the character of the buyer may be, or what use he may design to make of the property, whereas both these considerations might have an important bearing where real estate is the subject of the sale.

But it must not be thence inferred, that the principal has the right to raise mere capricious objections, even where he has imposed limitations or conditions as to the person of any purchaser, or to the purpose to which the property shall be devoted, but such limitations and conditions are to be construed reasonably.

As between the principal and the purchaser we have already seen that the former may be bound by the acts of his agent, although such acts may be contrary to the secret limitations or private instructions of the principal, on the ground that innocent persons, dealing in good faith with the agent on the strength of the authority with which he is apparently clothed will be protected, notwithstanding that the agent might be liable to the principal for violating his instructions, and which liability might involve not only the forfeiture of any claim for a commission in the transaction, but also the payment of damages. It is scarcely necessary to add, that if the purchaser is himself a party to any deception or concealment on the part of the agent, he is not an innocent purchaser, and consequently not within the protection of the law applicable to such purchasers.

Where an agent has been employed by the owner to sell real estate, the rule as to the measure of their respec-

tive rights in respect of the exercise by the agent of the authority imparted to him, and incidentally of his right to compensation, may be briefly stated as follows: If the agent has, in good faith and in accordance with his instructions, completed a negotiation so far as to obtain the unconditional acceptance of the offer of the principal by a party who is willing and able to carry out his contract of acceptance, it is then too late for the principal to interpose new or additional terms or restrictions, thereby involving perhaps the abandonment of the pending negotiation or the virtual making of a new one. And if the agent should assent to the proposed modification or addition of terms, he endangers his compensation for all his past labor, in the event that, as a consequence of the interposition of these new or additional terms, the present negotiation should fall through; hence the necessity of caution in this respect on the part of the agent, and the propriety of having all the terms and conditions of sale determined in advance and reduced to writing, so as to avoid any room for controversy regarding them.

As a result of the confidential relation existing between the parties and the good faith required, if the agent, being authorized to sell land for his principal at a fixed price sells it for a higher price, he must account to his principal for the excess,[1] unless the contract of employment contemplates an excess for the benefit of the agent in bill of compensation or as part of it. Neither can the agent become the buyer of the principal's property

[1] McDonald v. Fithian, 1 Gilm. 269; Zeigler v. Hughes, 55 Ill. 288; Meeker v. York, 13 La. Ann. 18; Bruce v. Davenport, 36 Barb. 349; Merryman v. David, 31 Ill. 404; Kerfoot v. Hyman, 52 Ill. 512; Love v. Hess, 62 Ind. 255.

even when authorized to sell at a particular price ;[1] nor, on the other hand, when employed to purchase, can the agent sell his own property to his principal,[2] and the interposition of a third party in the interest of the agent will make no difference.[3] Neither is it material whether there is a fraudulent design or not, nor whether the agent should make or lose by the transaction. In all such cases the transaction can be set aside by the principal upon discovery of the facts.[4]

Thus, where a stockbroker filled an order for the purchase of stock by selling his own stock *bona fide* at a fair price, but without disclosing the fact that it was his own; it was held, that the principal might repudiate the transaction and return the stock, notwithstanding it had in the mean time become worthless on the market and recover back the consideration.[5] The clerk of a broker employed to sell land, who has access to the correspondence between his employer and the owner, stands in such a relation of confidence to the latter, that, if he becomes the purchaser, he is chargeable as trustee for the seller and must recover or account for the value of the land.[6]

[1] Ruckman v. Burgholz, 37 N. J. L. 285; Armstrong v. Elliott, 29 Mich. 485.

[2] Deep River, etc. Co. v. Fox, 4 Ired. Eq. 61; Banks v. Judah, 8 Conn. 145; Matthews v. Light, 32 Me. 305; Copeland v. Mer. Ins. Co., 6 Pick 198; Moore v. Mandlebaum, 8 Mich. 433; Moore v. Moore, 5 N. Y. 256; Sturdevant v. Pike, 1 Ind. 277; McKinly v. Irvine, 13 Ala. 681; Cumberland, etc. Co. v. Sherman, 30 Barb. 553; Segar v. Edwards, 11 Leigh 213; Shannon v. Marmaduke, 14 Tex. 247.

[3] Hughes v. Washington, 72 Ill. 84; Eldridge v. Walker, 80 Ill. 270.

[4] Bain v. Brown, 56 N. Y. 285; Kutz v. Fisher, 8 Kans. 90; Ackenburg v. McCool, 36 Ind. 473.

[5] Conkey v. Bond, 36 N. Y. 427.

[6] Gardner v. Ogden, 22 N. Y. (Ct. App.) 327.

Where an agent, in charge of lands to collect rents and pay taxes, purchases the property at a greatly inadequate price by concealment of facts and information relating thereto, which he was bound to disclose, the sale will be set aside.[1]

So an agent, who discovers a defect in the title of his principal, cannot misuse it to acquire title for himself, but will be held a trustee for his principal.[2] And where a third person purchases from the agent lands so obtained from the principal with knowledge of the transaction between the agent and principal, the sale cannot be sustained.[3]

In all these cases the transaction, though not void, is voidable at the option of the principal. But it does not follow that the agent can in no case buy the land of his principal. The rule, that an agent cannot himself become the purchaser of his principal's property, applies to cases where either the agent becomes the purchaser without the knowledge of his principal—in which cases it is applied with great strictness,—or to cases where, although there is no concealment of the fact that he is the purchaser, there is a concealment of facts which should be disclosed to the owner in consequence of the relation then existing, or which has existed between the parties in connection with the property in question.[4] If the agent buys directly from the principal, there is in one sense no relation of principal and agent existing between

[1] Norris v. Taylor, 49 Ill. 17.
[2] Gardner v. Ogden, 22 N. Y. 327; Ringo v. Binns, 10 Peters 269; McMahon v. McGrow, 26 Wis. 614; Roggen v. Lockett, 28 Ark. 290.
[3] Norris v. Taylor, 49 Ill. 17; Kerfoot v. Hyman, 52 Ill. 512.
[4] Fisher's Appeal, 34 Pa. St. 29; Butler v. Haskill, 4 Desau. 651; Casey v. Casey, 14 Ill. 112.

them in the negotiation, but they are both principals in the transaction; yet the law is so jealous of the rights of his former principal, that it requires the agent, before changing his position to that of principal in any negotiation in respect to that which has been the subject of the agency, to first put his principal on equal terms with himself by acquainting him with all that he has himself learned with regard to the property, including any facts or circumstances which could be supposed to influence the judgment of the principal in the transaction. In other words, the agent must acquit himself of all duties and obligations resulting from the former relation, so that he shall in the negotiation possess no advantage over the owner in consequence of that relation having existed,[1] and the burden of proof is upon him to vindicate his fairness in the transaction.[2] But this condition being fulfilled, there is nothing then to prevent the parties dealing with regard to the property in the same manner as if the relation of principal and agent had never existed between them.[3]

Where a man employs an agent by parol to buy an estate, and the agent accordingly buys it, but no part of the consideration is paid by the principal, and there is no written agreement between the parties, the principal cannot compel the agent to convey the estate to himself.[4]

[1] Blount v. Robeson, 3 Jones (N. C.) Eq. 73.

[2] Rubridge v. Parks, 48 Cal. 215; Brown v. Post, 1 Hun. (N. Y.) 304; 10 Peters 269; Neely v. Anderson, 2 Strobh. Eq. 362; Condit v. Blackwell, 22 N. J. Eq. 481; Alwood v. Mansfield, 59 Ill. 496; see however, Uhlich v. Muhlke, 61 Ill. 499.

[3] Walker v. Carrington, 74 Ill. 446.

[4] Dorsey v. Clark, 4 Harr. & J. (Md.) 551.

Notice to the agent is deemed notice to his principal, but such notice to bind the principal must be to the agent, while engaged in the business and negotiations of the principal,[1] and when it would be a breach of trust in the former not to communicate the knowledge to the latter.[2]

It has been laid down as a general proposition by some authorities, that an agent of the seller cannot act as the agent of the buyer in the same transaction; that his employment by one is incompatible with his employment by the other; and this whether the sale is for cash, or is an exchange of property.[3]

In one case it was held, that the law does not permit the broker to act for both parties in an exchange of property, and proof of usage in this respect was held inadmissible;[4] in another, that even an agreement to pay commission in such case cannot be enforced.[5] "A broker" (it is said in one case) "cannot render such services to both buyer and seller at the same time as to entitle him to a commission from both."[6] So, where F employed S to sell land, the commission to be all above $125 per acre, and E agreed in writing with S to pay him $500 for services in assisting to negotiate a purchase of the land, S brought E and F together, and a contract was made for the sale of the land at $150 per acre. E and F afterward consummated the sale themselves.

[1] Pepper v. George, 51 Ala. 190; Houseman v. Girard, etc., 81 Penn. St. 256.

[2] Pringle v. Dunn, 37 Wis. 449.

[3] Dunlap v. Richards, 2 E. D. Smith, 181; Pierce v. Thomas, 4 id. 354.

[4] Lloyd v. Colston, 5 Bush. 587. See, also, Watkins v. Consall, 1 E. D. Smith, 65.

[5] Raisin v. Clark, 41 Md. 158.

[6] Pugsley v. Murray, 4 E. D. Smith, 245; Watkins v. Consall, *supra*.

In an action by S against E, for his commission, it was held, that since S was acting for both parties without their consent, he could not recover the $500 from E; that if the $500 was to be paid as a consideration for giving E the preference, this was selling his discretion, and was bad faith to F, and that the fact that F suffered no loss, did not vary the effect of the contract, as against public policy. [1]

On the other hand, where, in a negotiation for the sale of real estate, a broker was employed by both parties, with notice that he was acting in the matter for the other, and with such notice each agreed to pay him his commission, it was held, that he could recover from both.[2] In another case, A, knowing that B was the agent of C in making investments for him in real estate, employed B at as tipulated commission, to sell certain real estate at a specified price; B made the sale to C at a price exceeding that specified by A, paid A the specified price, less the stipulated commission, and retained the excess as the price of his services rendered to C in making the investment. In a suit brought by A against B for such excess, it was held that B, under the circumstances, might lawfully recover compensation for his services from both A and C.[3] So, where A agreed to pay B a certain sum to find him a tenant for his farm, and C agreed with the same B to pay him a certain sum for finding a farm which he, C, could hire, and by the mediation of B, A and C were brought together, and consummated a bargain for the letting and hiring of the farm; held, that the fact

[1] Everhart v. Searle, 74 Pa. St. 256.

[2] Rowe v. Stevens, 53 N. Y.

[3] Alexander v. Northwestern, etc. Univ. 57 Ind. 466.

that B acted for C as well as for A in the transaction constituted no bar to a recovery by B of the amount agreed to be paid him by A.[1] So, again, where the agent of different parties, who was employed to sell lands for each, brought about an exchange of the same between the owners themselves, it was held, that the agent was entitled to the customary commissions from each of his principals.[2] And where an owner employed a broker to sell a tract of land, agreeing to pay him $500 commission, if he would find a purchaser at a fixed price, and the broker found the purchaser, it was held, that thereupon the broker's agency ceased, and his then taking a retainer from the purchaser to see that the papers were properly prepared and executed, presented no ground for defeating a recovery of his commission.[3]

But where the broker acted for both parties in an exchange of real estate, without informing either, he was held not entitled to commission, and evidence to show a custom among brokers to charge commissions to both parties in such cases was held inadmissible.[4]

The better doctrine, perhaps, is that which, recognizing the difference between the case of a confidence reposed in the agent by the owner, and that where no confidence is reposed, but where the services of the agent are only required as a middleman or go-between, holds, that the policy of the law forbids that the same person should act at the same time as the agent of both parties, where he

[1] Herman v. Martineau, 1 Wis. 151.

[2] Mullen v. Kartzleib, 9 Bush. 253. See, also, Rupp v. Sampson, 82 Mass. 398, and 12 Centr. Law Journ. 278, and cases there cited.

[3] Short v. Millard, 68 Ill. 292.

[4] Farnsworth v. Hemmer, 1 Allen, 494; Walker v. Osgood, 98 Mass. 348; Scribner v. Collar, 40 Mich. 375.

is invested with a discretion by each, and where each is entitled to the benefit of his skill and judgment; even though the fact of the double employment should be known to both parties; but where the agent is used merely as a broker proper, and is only the medium of communication between the parties, nothing being left to his judgment or discretion going to the merits of the transaction, and no especial trust is reposed in him by either party, and the fact of his acting for the one is known also to the other, there is no valid objection to the double employment. [1]

[1] Siegel v. Gould, 7 Lans. 177; Utica Ins. Co. v. Toledo Ins. Co. 17 Barb. 132; Cent. Ins. Co. v. Prot. Ins. Co. 14 N. Y. 85; Vanderpool v. Kearns, 2 E. D. Smith, 70; Dunlop v. Richards, 2 E. D. Smith, 181. For further authorities on the question of double employment the professional reader is referred to: Hinckley v. Avey, 27 Me. 362; Draughan v. Quillan, 23 La. Ann. 237; Carman v. Beach, 63 N. Y. 97; Meyer v. Hanchett, 39 Wis. 419; Stewart v. Mather, 32 Wis. 344; Everhart v. Searle, 74 Pa. St. 256; Bollman v. Loomis, 41 Conn. 581; Cottom v. Holliday, 59 Ill. 176; Lynch v. Fallon, 11 R. I. 311; Rice v. Wood, 113 Mass. 133; Gordon v. Clapp, 113 Mass. 335; Shulaud v. The Monitor Iron Works, 3 Law and Eq. Rep. 272; Schwarz v. Yearly, 31 Md. 270; Bates v. Copeland, 9 Reporter, 492; Morison v. Thompson, L. R. 9 Q. B. 480; Clendenon v. Pencost, 75 Penn. St.; Lane v. Albright, 49 Ind. 275; Jones v. Adler, 34 Md.

CHAPTER III.

THE REAL ESTATE AGENT.

OF HIS AUTHORITY—ITS EXTENT AND DURATION—RATIFICATION—REVOCATION.

Our attention in the preceding chapter was confined to the employment of the agent, and to some of the rights and obligations resulting therefrom. Let us next see what authority he possesses in virtue of the contract of employment or otherwise.

The doctrine on this subject, as applicable to agencies in general, is laid down by Mr. Story, in his work on Agency, to the following effect: [1]

1st. The intention of the parties, deduced from the nature and circumstances of the particular case, constitute the true ground of every exposition of the extent of the authority conferred.

If, for instance, the agency arises from an authority to do a single or particular act, it is limited to the appropriate means to accomplish that act and the end required. Thus, if the authority of the agent extends only to settling the terms of the contract, or to drawing up the agreement, this would not include the power to sign the contract or execute the agreement.

2nd. If the authority of the agent be in writing, the nature and extent of the authority must be ascertained

[1] Story on Agency, chap. 6.

from the instrument itself, and cannot be enlarged by evidence of usage of other agents in like cases, or of an intention to confer greater powers. But for the purpose of interpreting the powers actually given, the authority is always construed to include all the necessary and usual means of executing it with effect, unless the contrary manifestly appears to be the intention of the principal, and repugnant to, or inconsistent with, the express terms of the authority; and that whether the authority be general or special.[1] In these usual and necessary means are included those means which are allowed or justified by the usages of the trade.

3rd. If the authority is an implied one, the natural presumption is, that the agency is to be conducted according to the known usages of the business of the particular class of agents; and whatever acts are usually done by them, are to be deemed incidents of the authority confided to them in their particular business, character, or employment.

The application of these rules will be best seen by a reference to judicial decisions involving them.

Where a broker having authority, if he could sell land for cash on delivery of the deed, "to close the bargain,' signed an agreement in the name of his principal to sell the land for the sum fixed, in cash, on the delivery of the deed, and also that the principal should give a warranty deed with full covenants and a perfect title, at any time

[1] Ibid. 1 Pars. on Cont. 61. See also, Wiggleson v. Dallison, Smith's Lead. Cases, 598–628; Loudon, etc. Soc. v. Hagerstown, etc. Bank, 36 Pa. St. 498; Davenport v. Peoria, etc. Ins. Co. 17 Ia. 276; Wilcox v. Routh, 17 Miss. 476; Topham v. Roche, 2 Hill (S. C.) 307; Williams v. Mitchell, 17 Mass. 98.

on demand within thirty days, it was held in a New York case [1] that the principal was not bound—"the express authority being merely to close the bargain, and not involving the right in the case of lands to sign a contract." "In dealing in real estate the authority to sign the contract is never understood to be granted from a mere authority to make a bargain." "The proposed purchaser may be very objectionable; he may be one who would erect nuisances to annoy his neighbors," etc. "An agent within the meaning of the Statute of Frauds, who can sign the name of the owner of lands to a contract for its sale, is not one who has a mere authority to make a bargain for the sale, but one who is made the owner's agent to sign his name to the contract; that agency may be by parol, but it is not included in the mere authority to sell." However the particular circumstances of the case may have justified the decision there arrived at, the doctrine there enunciated, that there is any argument, peculiar to agents for the sale of real estate, to be drawn either from the statute of frauds or from the nature of the subject-matter, which involves the conclusions there announced, seems to be rather an assumption than founded on legal principles.

A distinction undoubtedly exists between an unqualified authority to sell and one in which the duty of the agent is limited to looking up a purchaser and bringing him to the principal; or any of like character, in which the principal has expressly or impliedly reserved to himself the right to conclude the sale or "close the

[1] Coleman v. Garringue, 18 Merrill, 55 Ill. 52. Barb. 60. See, also, Taylor v.

bargain,"[1] but in the absence of such reservation and limitation, it seems a narrow construction of an authority "to sell and close the bargain," to say that the agent, in adopting the very means necessary to effectually accomplish the purpose of the agency, has exceeded his authority; and in a subsequent case in New York it was held, that under a general power to sell property, whether real or personal, the agent may bind his principal by a contract of sale.[2]

In a California case it was held, that the authority of a broker to sell real estate, implied from his vocation, is limited to the power of finding a purchaser satisfactory to the principal; but if the language of the principal used in making the employment clearly shows that he intended to give the agent a power more extensive than that of a mere broker, and to authorize him to make a written memorandum of sale, the court will enforce a written contract, made by him in pursuance of the agency.[3] In Illinois it is held, that "authority to sell land includes the necessary and usual means to make a binding contract in the name of the principal," and that "when the agent is authorized to negotiate and conclude a sale, authority is implied, to do for his principal what would have been incumbent on him to do to accomplish the same thing.[4] The weight of authority, as well as the analogies

[1] Taylor v. Merrill, 55 Ill. 52; Proudfoot v. Wightman, 78 Ill. 553.

[2] Haydock v. Stow, 40 N. Y. 363.

[3] Rudenburg v. Nain, 47 Cal. 213. The doctrine of the California case, while perhaps strictly correct under the facts of that case, would nevertheless, to the general reader, express a limitation of the broker's ordinary authority within bounds more strict than accurate.

[4] Johnson v. Dodge, 17 Ill. 433; Peabody v. Hoard, 46 Ill. 242; Cossitt v. Hoggs, 56 Ill.

drawn from the authority of a commercial broker,[1] and the presumption arising from the usages of the business,[2] would certainly all seem to be in favor of the doctrine of the Illinois courts.[3]

An authority to sell and convey lands for cash includes an authority to the agent to receive the purchase money, and an authority to make contracts for the sale of lands will authorize the agent to receive so much of the purchase money as is to be paid in hand on the sale, as an incident to the power to sell.[4] But the agent has no implied authority to give an extension of time to the purchaser to make the payments provided for in the contract of sale; his authority being simply to perform the contract as made, and not to make a new one.[5] A power of attorney confirming all sales, leases and contracts of every description to be made, confers a power to sell land.[6]

So a power authorizing the attorney, "to superintend my real and personal estate, to make contracts, and generally to do all things that concern my interest in any

231; Proudfoot v. Wightman, 78 Ill. 553.

NOTE.—It should, however, be remarked, with reference to the Illinois cases, that they were decided either before the enactment of the present Statute of Frauds of that State, requiring the authority of the agent to make a contract for the sale of lands to be in writing in order to bind his principal, or under circumstances not involving the consideration of this requirement. See *post*, pp. 63 and 65.

[1] Story on Agency, sec. 109.

[2] Ibid. sec. 77, 96, 97 and 107,

[3] Pringle v. Spaulding, 53 Barb. 17; Talman v. Franklin, 14 N. Y. 584; Parish v. Koons, 1. Pars. Sel. Cases, 79; Graves v. Legg, 34 Eng. Law and Eq. 489; Hawkins v. Chance, 19 Pick. 502; Hunt v. Gregg, 8 Blackf. 105; Lawrence v. Taylor, 5 Hill, 107; Venada v. Hopkins, 1 J. J. Marsh, 283; Yerby v. Griggsby, 9 Leigh. 357.

[4] Yerby v. Griggsby, 9 Leigh 357; Story on Agency, sec. 59.

[5] Gerrish v. Maher, 70 Ill. 470.

[6] Sullivan v. Davis, 4 Cal. 291.

way, real or personal, whatsoever" etc., empowers the attorney to convey real estate and therefore to make a lease, with the right to purchase.[1]

So, a power to sell any of the constituent's real estate authorizes the attorney to sell real estate which the constituent acquires after the execution of such power;[2] and under a power to sell all the land of the principal which the latter had not previously conveyed, the attorney was held to be authorized to sell what land his principal had previously sold, but not conveyed.[3]

So, a power of attorney to sell certain lands "for the purpose of making actual settlement thereon," and "to sign, seal and deliver sufficient deeds," etc., leaves it to the judgment of the attorney to determine whether the purchasers buy for the purpose specified in the power; and if there is no evidence of fraud on the part of the purchaser, or attorney, the conveyance under the power will be valid, although it should afterwards appear that the land was purchased not for purpose of settlement but on speculation.[4] A power of attorney by a purchaser to his attorney in fact, to take a conveyance and give mortgage for the purchase money, authorizes a *power of sale* in the mortgage, where it is the custom of the mortgagee to require such a power and it was known to the purchaser.[5] A power of attorney authorized an agent to "grant, bargain and sell" certain lands, "or any part or parcel thereof, for such sum or price or on such terms

[1] De Rutter v. Muldron, 16 Cal. 505.

[2] Fay v. Winchester, 4 Metc. 513; Burkey v Judd, 22 Minn. 287.

[3] Mitchell v. Maupin, 3 T. B. Monr. (Ky.) 185.

[4] Spofford v. Hobbs, 29 Me. 148.

[5] Wilson v. Troup, 7 Johns Ch. 25.

as to him shall seem meet, and for me and in my name to make," etc., deeds, "for the same, either with or without covenants of warranty." Held, that the agent had authority to sell on reasonable credit; that he had authority to receive payment, and that a payment to him was a good payment to the principal; that if circumstances rendered it favorable for the interest of his principal he might include other valuable considerations besides money in the consideration, and might sell an undivided interest in the property.[1]

A power to sell "the one half" of a lot of land without specifying which, or whether an undivided one half, empowers the attorney to sell one half in severalty, and to exercise his own discretion as to which half.[2] But an authority "to sell, transfer and convey" lands "and to do and perform all acts and deeds for me and in my name, concerning any and all property I may own," does not authorize the agent to barter or exchange the land for other property.[3]

So, where the owner of land, a part of which was surveyed in lots, gave his agent a power of attorney to convey the same "in lots as surveyed by B," a conveyance by the agent to G of a portion of the land which had not been surveyed, was held invalid as an excess of authority under said power.[4]

It is questionable if covenants of general warranty are permissible generally, under a mere power to sell and convey, unaccompanied by language in the power expressly or impliedly authorizing such covenants.

[1] Carson v. Smith, 5 Minn. 78.

[2] Alemany v. Daly, 36 Cal. 90.

[3] Reese v. Medlock, 27 Tex. 120.

[4] Rice v. Tavernier, 8 Minn. 248.

It has been held in Ohio, Vermont, Kentucky, and the Supreme Court of the United States, that a power to sell and convey land, includes an authority to convey it with covenants of general warranty,[1] but the contrary has been held in New York, Illinois and Wisconsin.[2]

A power to the agent to sell lands on such terms in all respects as he might deem most advantageous, and to execute deeds of conveyance necessary for the full and perfect transfer of the title, authorizes the agent to insert in the deed the usual covenants of warranty.[3] And where the question of the power is open, usage, it is said, may be invoked to determine it.[4]

A power of attorney to take all necessary means to secure the right and title of the principal to certain real estate and to employ lawyers, gather testimony, and to provide the necessary expenses of the same, was held not to confer authority to convey one half the premises to the lawyers for their services and for their agreeing to provide for the expenses of the suit to confirm the title, and in case of success to pay a certain sum in addition.[5]

An agent authorized to enter into "written contracts" for the sale of land cannot enter into verbal agreements for its sale.[6] An expression "I will sell" on specified

[1] Taggart v. Stanbery, 2 McLain, 543; Peters v. Farnsworth, 15 Verm. 155; Venada v. Hopkins, 1 J. J. Marsh 293; Le Roy v. Beard, 8 How. 441; see, also, Bronson v. Coffin, 118 Mass. 156.

[2] Yazel v. Palmer, 88 Ill. 597; Tudro v. Cushman, 5 Wis. 279; Nixon v. Hyserott, 5 Johns. 58.

[3] Story on Agency, sec. 59 note 8 and cases there cited.

[4] Peters v. Farnsworth, 15 Verm. 155.

A power of attorney, constituting one "a general and special agent to transact all manner of business," is too vague and indefinite to necessarily imply a power in the agent to sell. 1 Pars. on Cont. 47.

[5] Blum v. Robertson, 24 Cal. 127.

[6] Barmig v. Pierce, 5 Watts & Serg. 548.

terms is not an employment of the agent, nor does it confer any authority on an agent to make a contract of sale; neither does a correspondence between the owner and agent, concerning the property and price and terms of sale, of itself confer any such authority.[1]

In general, a power to *sell* land does not include the power to lease or exchange it[2] nor to mortgage it.[3] There are exceptions to this rule, however, as regards the power to mortgage. These exceptions are, where the occasion of the power to sell is to provide means to raise charges, or pay off liens or incumbrances on the land, such as mortgages, legacies, etc.

It has already been stated, that whenever any act of agency is required to be done in the name of the princi-

[1] Bosseau v. O'Brien, 4 Biss. 395.

[2] Trudo v. Anderson, 10 Mich. 357; Lampkins v. Wilson, 5 Heisk. 555.

[3] Stroughhill v. Anstey, 1 De Gex M. & G. 635; Page v. Cooper, 16 Bevan 396; Halderby v. Spafford, 1 Bevan 395; Content v. Servos, 3 Barb. 128; Russell v. Russell, 36 N. Y. 581; Bloomer v. Waldron, 3 Hill 361; Taylor v. Galloway, 1 Ohio 232; Morris v. Watson, 15 Minn. 212; Cummings v. Williams, 1 Sanf. Ch. 17; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Watson v. McComb, 1 Hill 111; De Vagner v. Robinson, 5 Weekly Rep. 509; Gaylord v. Stebbings, 4 Kans. 42; Dupont v. Wortheman, 10 Cal. 354; Mott v. Smith, 16 Cal. 533; Hoyt v. Jacques (Mass. 1880) 2 Centr. L. J. 278; Lewin on Trusts, 416; 1 Herman on Mtgs. sec. 237; 1 Jones on Mtgs. (2d ed.) sec. 129. Contra: Mills v. Bank, 3 Pere Will. 453; Zane v. Kennedy, 73 Penn. St. 182; see, also, Starr v. Moulton, 97 Ill. 525.

The question referred to in the text more frequently arises under powers in wills, but as it may also arise under ordinary powers of attorney, it is here noticed. The case of Mills v. Bank, is the leading authority relied upon by the advocates of the doctrine that a power to sell includes a power to mortgage, but an examination of the facts in the case will show, that the mortgage in that case was made to *raise a charge on the estate*, and so comes within the exceptions mentioned. See review of this case in Stroughhill v. Anstey. The Pennsylvania case was admittedly opposed to the current of authority, but so decided in order not to disturb a settled rule of property established in that State.

pal, *under seal*, the authority to do the act must itself be conferred by an instrument under seal; and that in such case the writing conferring the authority must possess the same requisites and observe the same solemnities as are necessary in the instrument authorized to be executed. A power to convey lands must, therefore, be under seal, since the conveyance itself must be under seal; but an agreement to convey if executed by the principal need not be under seal; the authority to sign such agreement, therefore, need not be under seal. If, however, an agent, authorized by parol only, executes a sealed instrument, the agreement may bind the principal as a simple contract, or as an agreement to convey.[1] So, if the instrument executed by an agent be one which without seal would bind the principal, it will bind him if under seal.[2] And where the agent sold land for his principal, adding covenants not warranted by his authority, it was held that the principal should be compelled to perform that part of the contract wherein the agent had power to bind him.[3]

The doctrine, that where an agent is authorized to sell land, the employment includes the usual and necessary means to make a binding contract in the name of his

[1] Worrall v. Munn, 1 Seld. 29; Wood v. Aub. R. R. Co. 4 Seld. 160; Crozier v. Carr, 11 Tex. 376; Cooper v. Rampkin, 5 Binn. 613.

A power to invest money on mortgage does not authorize an investment on second mortgage. Whitney v. Martine, 6 Abb. (N. Y.) N. Cas. 72. And a general power to loan does not authorize taking usury, etc., and the taking it by the agent does not affect the principal unless he ratifies the act. Gokey v. Knapp, 44 Iowa 32.

[2] Salmon v. Hoffman, 2 Cal. 138; Johnson v. Magruder 15, Mo. 365; but see Wheeler v. Nevine, 34 Me. 54; and Bauorgee v. Hovey, 5 Mass. 11.

[3] Wood v. Aub. R. R. Co. 9 N. Y. 160.

principal, is subject to some exceptions, at least as between the principal and purchaser;[1] these exceptions are the result of statutory enactment, and prevail in the States of Alabama, Illinois, New Hampshire, Pennsylvania, Vermont, and possibly some others.

The Illinois statute provides that "no action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully *authorized in writing, signed by such party.*[2] The Statutes of Frauds of the other States named, contain similar provisions, and they differ from the English statute, which has been substantially adopted in the remaining States, in that they require the agent's authority *to be in writing;* whereas, under the English statute, even where by law an instrument in writing was necessary to bind the party, he could, without writing, authorize an agent to sign it in his behalf.[3]

The effect of the Illinois statute is, that unless the agent has written authority from his principal, and signed by him, so to do, he cannot enter into a contract on behalf of the principal for the sale, etc., of land, which will bind the principal if he sees fit to avail himself of the statute. But the pleading of the statute is a personal privilege, confined to the principal. Another party can neither plead it for him nor compel him to plead it;[1]

[1] Venada v. Hopkins, 1 J. J. Marsh. 285.
[2] Rev. Stat. Ill. ch. 59, sec. 2.
[3] Dodge v. Wilder, 15 Ill. 407.
[4] McCoy v. Williams, 1 Gilm. 584.

nor can a stranger to the contract plead it.[1] The statute has no bearing on the right of the agent to commissions, since his claim therefor is in no wise based upon the contract mentioned in the statute, but on the contract of employment.

It may be remarked, in passing, that the want of written authority to sign the contract[2] would not prevent the agent from securing the execution of it by the other party thereto, and then if the principal refuses to sign it, or give the agent the necessary written authority to sign it in his behalf, the principal would be estopped from denying that the agent had performed his whole duty in respect to the consummation of the negotiation; though, as we shall hereafter see, the adoption of the course suggested is not necessary. In this connection it may not be amiss to add a word of caution, suggested by the decision in an Illinois case prior to the statute of 1869, and which is equally applicable, whether the agent have a written or merely a verbal authority, or whether the authority is one valid under the law of a particular State or not. The case was where an agent employed to sell certain land for his principal had negotiated, by verbal agreement with a purchaser, a sale of the property on the terms authorized, but which sale the principal afterward repudiated. The agent, notwithstanding this repudiation, executed a written agreement to the purchaser, as evidence of the sale upon the terms stipulated in the

[1] Chicago Dock Co. v. Kinzie, 49 Ill. 289.

[2] As to what constitutes the written authority contemplated by the statute, see *post*. The authority to sign the contract, if done by order and in the presence of the principal, need not be in writing. Meyer v. King, 29 La. Ann. 567.

verbal agreement; but the court held, that when the agent found that his principal had repudiated the sale, although the repudiation may have been improper, his functions as an agent, so far as regarded that sale, were at an end, and he had no right afterward, under pretense of protecting the purchaser, or to embarrass his principal, to give the purchaser the written contract; and that the principal could set off, in an action brought by the agent for his commission, any damage he may have incurred in consequence of the execution of the written contract by the agent, after he was made aware that the principal had repudiated the sale.[1]

The question sometimes arises, whether an act is void or not as to the principal, where the agent has done less than he was authorized to do; or, on the other hand, has done more than he was authorized to do. The rule in cases of this sort is, 1st, that while it is true that the principal is not bound by the unauthorized acts of his agent, he is bound where the agent has *substantially* pursued the authority given him.[2] Thus, if the authority was to buy or sell a certain parcel of land, the purchase or sale of a less interest than the fee therein, would not be a substantial pursuance of the authority; or if the authority is "to buy a house, with the adjoining wharf and store," and the agent should buy the house only, although at an advantageous bargain, the principal would not be bound to take the house.[3] So, where an agent is authorized to sell land, a sale of part of it at one time and a sale of another part at another time might in some

[1] McEwan v. Kerfoot, 37 Ill. 530. See, also, Reed v. Latham, 40 Conn. 452.

[2] Story on Agency, sec. 170; State v. Allen, 43 Ill. 456.

[3] Story on Agency, sec. 176.

cases be good, and in others be deemed bad; dependent on the presumption of the intention of the authority and the consideration whether a partial sale would be injurious or not to the sale of the residue.[1] But if the principal should authorize his agent to sell his houses and lands in a particular place, where he owned several distinct houses and tracts of land in severalty, a sale of one house or tract at one time, and of another house or tract at another, would ordinarily be good.[2] But the mere fact that the bargain which is made will be more beneficial for the principal, will not avail the agent, if it be different from the substance of the authority: thus, if the authority to the agent be to purchase a particular house at a price named, the purchase by the agent of another house at a lower price, and which is really a better house, would not bind the principal, for the house is not that which he authorized to be bought. 2nd. Although the agent has exceeded his authority, if the unauthorized acts are clearly distinguishable from those which were authorized, the principal will be bound *pro tanto*:[3] that is to say, where there is a complete execution of the authority, and something beyond is added, there the execution of the power is good up to the limit of the authority, and the excess only is void,[4] provided the boundaries between the excess and the rightful execution are distinctly apparent.[5] For instance, if the power were to lease for 21 years, and the agent should make a lease for 40 years, it would be

[1] Ibid. 179.
[2] Ibid.
[3] State v. Allen, 43 Ill. 456; Drumwright v. Philpot, 16 Ga. 424; Venada v. Hopkins, *supra*.
[4] Ibid. Jessup v. City Bank, 14 Wis. 331.
[5] Johnson v. County of Stark, 24 Ill. 75.

a good execution of the power in equity (although not at law) for the 21 years, and void as to the residue. So, if the authority be to sell one piece of land, and the agent should also include in the contract of sale another piece of land belonging to the principal, the execution of the authority would be good in equity as to the one piece, if the whole contract as to this piece is clearly divisible from the portion of the contract relating to the other. But if a principal should authorize the agent to purchase a certain piece of land at a given price, and the agent should purchase the land at a greater price, the purchase would not be binding upon the principal; or at least not binding upon him unless the seller should offer to take the price to which the agent was limited; but the weight of authority is to the effect that if in such case the excess over the limited price is waived, or (it may be) paid by the agent, the principal would be bound.[1]

An agency may be terminated either by the accomplishment of the purpose for which it was created; by the expiration of the time originally fixed for its continuance; by the renunciation of it by the agent, and by his insanity or death.

So, where a firm is the agent, the death of one of the members, or any other dissolution of the firm, terminates the agency.

Where, however, the authority has been partly executed, the agent is not at liberty voluntarily to renounce the agency, if thereby damage may be occasioned to his principal. And even where nothing has been done under the authority, if the agency is founded on a valuable

[1] Story on Agency, sec. 174 and note.

consideration moving from the principal, the agent makes himself liable for the damage which the principal may sustain in consequence of such renunciation, and, it is said, it is proper in all cases that the agent shall therefore give notice to his principal of his renunciation.[1]

Where the agent is entrusted with the care of property by a principal, especially by one who is a non-resident, the propriety of this rule is obvious, but where the agent is merely employed to buy or sell real estate, it is difficult to see how any claim for damage to the principal can be substantiated, even should the agent without notice abandon the agency, provided he has done nothing thereunder, however proper it might be in point of ethics or courtesy that he should have first given notice of such intention. The statement that the insanity or death of the agent terminates the agency has this qualification, that if the authority is coupled with an interest, the power would pass to the agent's representatives.[2]

So, on the other hand, the agency may be terminated either by the principal himself, or by some change in his condition or estate. As a general rule, the principal may at his pleasure revoke or recall the authority he has given to his agent, but to this rule there are exceptions. One of these exceptions is where the authority is part of the security given to the agent; another is where, for a valuable consideration, the principal has expressly stipulated that the authority shall not be revoked, and the agent has an interest in its execution. But the mere voluntary insertion of a provision, without consideration,

[1] Ibid. sec. 462 *et post.*

[2] 1 Parsons on Contr. 72.

in the instrument conferring the authority, that the latter shall be irrevocable, would be inoperative.[1] On the other hand, where the power is part of the security, or where the power is coupled with an interest, as it is called, the authority would be presumed in law to be irrevocable, even though it be not so provided in express terms, if there was nothing in the instrument to negative such presumption.[2]

By a power coupled with an interest is meant that the agent or attorney has an interest in the land itself, as distinguished from the proceeds of it.[3] One distinguishing feature of such a power is that the attorney can contract in his own name, and it is this feature of it which enables it to survive the death of the principal.[4] A familiar illustration of a power of this kind is the trust deed in common use, whereby the land is conveyed to a trustee, who becomes the attorney in fact of the grantor, with power to sell in case the indebtedness thereby secured is not paid. The foundation of the doctrine that the powers given under the circumstances and for the purposes above mentioned should be irrevocable, is that the principal should not be at liberty to violate his own solemn engagement, or to destroy the security by an act that would operate as a fraud upon those whom he has vested with the authority.[5]

Except in the single instance of a power coupled with an interest, the death of the principal operates as a revo-

[1] Walker v. Denison, 86 Ill. 162.
[2] Merry v. Lynch, 68 Me. 94; Story on Agency, sec. 477.
[3] Hunt v. Rousmanier's Adms. 8 Wheat. 174; LeMoyne v. Quimby, 70 Ill. 399.
[4] 1 Pars. on Contr. 72; Story on Ag. sec. 488.
[5] Ibid. sec. 477.

cation of the authority of the agent,[1] even though the power is declared in express terms to be irrevocable; and that for the obvious reason, that since a dead man can do no act, and any act which an agent is required to do in the name of his principal, must be one which the principal could himself at the time do, it is impossible that the act should be properly done. But where the act to be done could be properly done by the agent in his own name, in consequence of his being vested with the legal title, the death of the principal cannot affect the power.[2] In the other instances of irrevocable powers named, it is apparent that the right of the agent must be limited to that of requiring the representatives of the deceased to perform the acts necessary for his protection.[3] An authority, which is not in its nature or by contract irrevocable, may be revoked by operation of law, whereby the principal is incapacitated from doing the act, whence it follows that the agent cannot (while the incapacity exists) do it. Thus, if the principal should become insane, bankrupt, or being an unmarried woman, should afterward marry,[4] in all these cases the authority before conferred would be revoked.

But, subject to the qualifications and exceptions mentioned, the rule is well established, that the principal can revoke the authority he has given to his agent, at any time before it has been actually exercised.

[1] Davis v. Windsor Sav. Bk. 46 Verm. 728; Clayton v. Merritt, 52 Miss. 353.

[2] Story on Ag. sec. 488; 1 Pars. on Contr. 72. For an elaborate review of the authorities as to the effect of the death of the principal as a revocation of authority, see 19 Am. Law Reg. (N. S.) 40, July, 1880.

[3] 1 Pars. on Cont. 72.

[4] Story on Ag. sec. 481. See, however, *ante* p. 6 and note, and Henderson v. Ford, 46 Tex. 627.

Where the authority has been in part executed, the revocation will only be good as to the part unexecuted; and if the authority is not divisible, and the agent will sustain damage on account of the partial execution, unless allowed to complete it, the principal will not be permitted to revoke the unexecuted part without indemnifying the agent, and in such cases the rights of the other parties to the contract, as well as their remedies, are unaffected by the revocation.[1]

Revocation may be by a direct notification to the agent, in writing or by parol; and that even where the power was given by deed,[2] or it may be implied from circumstances; as if the principal should himself, or by another person, sell the property.

The revocation takes effect, as to the agent, from the time it is made known to him; therefore a revocation by letter takes effect from the receipt of the letter by the agent, and not from the date of writing.[3]

If the agency be a general one, the revocation takes effect as to third persons who have dealt with the agent[4] when it is made known to them; so that acts of the agent done after the revocation of the agency by the principal bind the principal so far as regards third persons who have no notice of the revocation.[5]

Where, however, the agent has only a special authority to do a particular act, no notice of the revocation to

[1] Story on Ag. sec. 466; Stillman v. Mitchell, 2 Robt. (N. Y.) 523.

[2] Brookshire v. Brookshire, 8 Ired. (N. C.) 674.

[3] Robertson v. Clound, 47 Miss. 208.

[4] 1 Pars. on Cont. 71.

[5] Murphy v. Ottenheimer, 84 Ill. 39; Beard v. Kirk, 11 N. H. 498; Hancock v. Byrne, 5 Dana, 514; Lamothe v. St. Louis, etc. R. R. Co. 17 Mo. 204.

third persons is necessary,[1] but if such agency should be constituted by writing, and is revoked, but the written authority is left in the hands of the agent, and he exhibits it to a third person, who deals with him on the faith of it, without any notice of the revocation, the acts of the agent, within the scope of the authority ostensibly imparted by the written document, have been held to bind the principal,[2] on the principle that "where one of two innocent persons must suffer, he shall suffer who by his confidence, silence or conduct has misled the other."

If the authority of the agent has not been terminated in any of the modes mentioned, the question as to the term of its continuance is one of fact, to be determined in view of the particular circumstances of the case.[3] This point was touched upon in what has been said as to revocation being implied from circumstances, and also in the statement that the agent may renounce the agency. But the question as to what acts of the agent will amount to a renunciation, or what circumstances will of themselves raise the presumption of either such renunciation or of a revocation, deserves somewhat further notice.

In Proudfoot v. Wightman,[4] where authority was given to the broker (as it was claimed) in June, 1865, to sell certain property, then worth $150 per acre, at that price, but the broker did not sell it until three years afterward, when he sold it for $150 per acre, although it was then worth $500 per acre, and in the meantime had had no

[1] 1 Pars. on Cont. 71.
[2] Beard v. Kirk, *supra;* Story on Ag. sec. 470 and cases cited.
[3] Peabody v. Hoart, 46 Ill. 242.
[4] Proudfoot v. Wightman, 78 Ill. 553.

communication with the owner, who was a non-resident, the court considered the sale was unauthorized, and said it was the plain duty of the broker to notify his principal of the increase in value, before attempting to sell the property at the old price, and if this duty was disregarded, and an attempt made to sacrifice the property, this would be a fraud upon the rights of the owner.

The decision in this case was evidently based on one or both of the following grounds: 1st. From the length of time which had elapsed since the authority was given, and during which time the agent had done nothing to indicate to his principal that he considered the employment continuing, the principal had a right to infer that the agent had abandoned the agency. He certainly had neglected his duty, in the light of the facts disclosed, even if he had not violated it, if he was during the three years the agent of the owner; and since the law will not *presume* he was guilty of wrong doing, the inference would be that he was not acting as such agent. 2nd. The price fixed at the time of the original employment was based on the value of the land and the conditions at that time, and could not be assumed to be the price the principal would have asked when the sale was effected, had he been then made aware, as he should have been, of its increased value, and of the altered conditions of the market; so that the broker had not in fact, in 1868, authority to sell the land at $150 per acre; and as the agency was a special one, not only the agent but the purchaser would be bound by the authority actually vested in the agent. What was said in the decision about fraud, must be taken as an expression of opinion on a

question of ethics, rather than as a ground of the decision; since even in cases of special agency, if the authority actually exists, a fraudulent intent in the exercise of it, on the part of the agent, not participated in by the purchaser, could not affect the validity of the transaction.

But, after all, each case must rest on its own peculiar circumstances; and the most that can be said in a general way towards the determination of the question whether an authority is yet continuing is perhaps this: that the authority once given to sell at a price fixed, without limitation as to time, will, in the absence of any evidence to the contrary, be presumed to continue for a reasonable time, and what that reasonable time shall be will depend on the circumstances of the particular case. What might be regarded as a reasonable time in a period of stagnation and depression, might at a time of extreme and rapid fluctuations and of animation, be a very unreasonable one, and especially so in case of appreciation in values.[1]

If the broker will put himself in the place of his principal, and keep in mind this fact, that he is to represent the interests of his principal throughout, the question whether any proposed act is within the intentions of the principal as they may now be presumed to be (and consequently within the presumed authority of the agent), supposing the principal to be advised of all the facts now within the knowledge of the broker, will not be so difficult to answer. Thus, though a considerable time may

[1] But in Wilkinson v. Churchill, 114 Mass. 184, it was held, that evidence that a lot of land in one year doubled in value has no tendency to prove that a broker was not authorized to sell during the year, at the original price.

have elapsed since the original employment, if there has been in the meantime no material change in the value of the property, or, if the principal has been kept advised of any change, and the broker has done nothing indicating an abandonment of the agency, but has persisted in his efforts to sell; especially with the knowledge of the principal; or has been in frequent communication with the principal, and has acted fairly in his interest,—these circumstances would all tend to establish a presumed continuance of the original authority, so as to make the contract of the agent binding on the principal. In any event, if the owner avails himself of the services of the broker rendered pursuant to the original employment, and adopts the contract of the latter made in accordance with the terms of the original authority, with full knowledge of all the facts in the case, this would be an acquiescence in, and ratification of, the acts of the broker.

Lastly in order, under the head of the authority of the agent, let us briefly consider the effect of, and what amounts to, a ratification by the principal of the acts of the agent.

It has already been intimated that the ratification by the principal of a contract of the agent amounts to a waiver by the principal of the want of authority of the agent, the legal effect of the subsequent ratification of a previously unauthorized act being precisely equivalent to a previous delegation of authority to do the act.[1]

[1] Clark v. Vau Reinsdeck, 9 Cranch 153; Goodell v. Woodruff 20 Ill. 191; Meyers v. Simmons, 19 La. Ann. 370; Williams v. Mitchell, 17 Mass. 98; Baker v. Byrne, 10 Miss. 193; Despatch, etc. v. Bellamy Mfg. Co., 12 N. H. 205; Workman v. Cuthrie,

Such ratification would be presumed from the silence or acquiescence of the principal after receiving information of the facts,[1] unless the information came too late to prevent the effect of the acts of the agent.[2]

So, the receipt of the purchase money of the land sold,[3] long acquiescence,[4] the bringing of a suit by the principal, based on the acts of a party claiming to have acted as agent;[5] a letter from a principal to his agent, authorizing certain acts, although received subsequent to their performance,[6] would be all acts of ratification.

The principal cannot by his own mere authority ratify a transaction in part and repudiate it as to the rest;[7] and a valid, binding ratification once made cannot afterward be revoked or recalled; but the principal is bound

20 Pa. St. 495; Weisinger v. Wheeler, 14 Wis. 101; Bell v. Ryerson, 11 Ia. 233; Barbour v. Craig, 6 Litt. (Ky.) 213; Cowan v. Wheeler, 31 Me. 439; Lowry v. Harris, 12 Minn. 255; Ruggles v. Washington County, 3 Mo. 496; Como v. Port Henry Co. 12 Barb. 27; Courcier v. Riter, 4 Wash. 549.

[1] Law v. Cross, 1 Blackf. 533; Williams v. Merritt, 23 Ill. 623; Mangum v. Bell, 20 La. Ann. 215; Brigham v. Peters, 1 Gray 139; Bredin v. Dubarry, 14 S. & R. 27; Hall v. Harper, 17 Ill. 72; Shaw v. Nudd, 8 Pick. 9; Maddux v. Bevan, 30 Md. 485.

[2] Amory v. Hamilton, 17 Mass. 103; Chernis v. Bleeker, 12 John. 300; Lindsley v. Malone, 23 Pa. St. 24.

[3] Stockbridge v. West Stockbridge, 14 Mass. 261; Powell v. Gossam, 18 B. Monr. 179; Baines v. Burbridge, 15 La. Ann. 628; Seago v. Martin, 6 Heisk. 308; Breithaupt v. Thurmond, 3 Rich. (S. C.) 216.

[4] Kehler v. Kemble, 26 La. Ann. 93; Law v. Cross, 1 Blackf. 523; Hall v. Harper, 17 Ill. 72; Williams v. Merritt, 23 Ill. 623; Maddux v. Bevan, 30 Md. 485; Bingham v. Peters, 1 Gray 139; Johnston v. Berry, 3 Ill. App. 256.

[5] Dodge v. Lambert, 3 Bosw. 570; Bank of Beloit v. Beale, 34 N. Y. 473; Corser v. Paul, 41 N. H. 24; Walker v. Mobile, etc. R. R. Co., 34 Miss. 245; Folger v. Mitchell, 3 Pick. 396.

[6] Rice v. McLaren, 42 Me. 157.

[7] Fisher v. Stevens, 16 Ill. 397; Henderson v. Cummings, 44 Ill. 325; Widner v. Lane, 14 Mich. 124; Pallman v. Stark, 1 Oreg. 115, Elwell v. Chamberlain, 31 N. Y. 611; Newell v. Hurlbut, 2 Verm. 351; Bishop v. Stewart, 13 Nev. 25.

by it, whether it be to his detriment or to his advantage;[1] and where a contract made by the agent without authority is afterward ratified by the principal the ratification will in general release the agent from all responsibility on the contract.[2]

Thus, if a person should in his own name, but professedly as the agent of the owner, sign an agreement for the sale of land, without any authority from the owner, and the latter should afterward sign the same agreement and declare thereon that he sanctioned and approved the agent's having signed it in his behalf, the agent will not be personally responsible upon the contract, but the principal alone will be liable; even although, without such ratification, the agent might have been held liable thereon. The ratification relates back to the original signing by the agent, and makes the instrument binding on the principal in the same manner and to the same extent as if he had originally authorized it, and of course the agent under such circumstances will not be personally liable, unless by the form of the instrument, or his mode of signing it, he has made himself liable in any event.[3] A

[1] Story on Agency, sec. 242; Watterson v. Rogers, 21 Kans. 529.

[2] But the ratification of the tort of an agent does not release the agent from liability; although by such ratification a liability is incurred by the principal. 1 Pars. on Cont. 52 and note. It is not true, however, that no contract vitiated by fraud of any kind is capable of subsequent ratification. The distinc- is this: that, when the fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy, and hence cannot be permitted; but where the transaction is contrary only to good faith and fair dealing, when it affects individual interests and nothing else, ratification is allowable; Schisler v. Van Dyke, Sup. Ct. Penn. 1880, 9 Law Rep. 657.

[3] Story on Agency, sec. 251, 244; Pollock v. Cohen, 32 Ohio St. 514.

ratification, however, can only be made when the principal at the time possesses the power to do the act ratified;[1] and no act is capable of ratification which was not performed by the agent, *as agent*, and in behalf of his principal.[2] It remains to be added that the ratification of the acts of an unauthorized agent will not bind the principal unless at the time of ratification he was fully aware of all the circumstances;[3] and that, whether the want of knowledge arise from the designed or unintentional concealment or misrepresentation of the agent, or from his mere inadvertence.[4]

In view of what has before been said as to sealed instruments, it follows that, if the unauthorized act of the agent be in the name of the principal by an instrument, necessarily under seal, the ratification must be under seal also;[5] and so, where, as in Illinois, the authority to bind the principal by a contract for the sale of lands, etc., must be in writing, the ratification must be in writing, since the ratification cannot in this respect stand upon higher ground than the original authority.[6] But in those States where the authority of the agent need not be in writing,

[1] McCracken v. San Francisco Co. 16 Cal. 591; Lewis v. Kerr, 17 Iowa 73; Gokey v. Knapp, 44 Iowa 32.

[2] Collins v. Swan, 7 Root, N. Y. 623; Fellows v. Commrs. 36 Bach. 655; Com. Bank v. Jones, 18 Tex. 80.

[3] Owings v. Hall, 9 Peters 607; Lidrick v. Rice, 13 Ia. 214; Fletcher v. Dysart, 9 B. Monr. 413; Woodbury v. Larned, 5 Minn. 339; Pittsb. etc. R. R. Co. v. Gazzan, 32 Pa. St. 340; Hardeman v. Ford, 12 Ga. 205; Dodge v. McDonald, 14 Wis. 553; Dickenson v. Conway, 12 Allen 407; Seymour v. Wyckoff, 10 N. Y. 213; Stein v. Kendall, 1 Bradw. 103; Lester v. Kinne, 32 Conn. 7; Bosseau v. O'Brien, 4 Biss. 395; Kerr v. Sharp, 83 Ill. 198.

[4] Story on Agency, sec. 243.

[5] Ibid. sec. 249 and 242; 1 Pars. on Cont. 52.

[6] Browne on Stat. of Frauds, 19; Ingraham v. Edwards, 64 Ill. 526.

if the agent without authority has entered into a contract which the statute requires to be in writing, the principal will be bound by a parol ratification.[1] So, if the writing were *unnecessarily* under seal, it is conceived, that although the authority must have been in writing to bind the principal, a written ratification not under seal would be sufficient to make the instrument binding as a simple contract.[2]

[1] 1 Pars. on Cont. 52.

[2] Story on Ag. sec. 242 and note; 1 Pars. on Cont. 52; Crozier v. Carr, 11 Tex. 376; Adams v. Power, 52 Miss. 828; State v. Spartanburg, etc. R. R. Co., 8 S. C. 129.

CHAPTER IV.

THE REAL ESTATE AGENT.

OF REPRESENTATIONS.

We have supposed the agent to have been duly authorized and employed to sell land for his principal, and that he is now looking for a purchaser, and have touched upon some of his duties in that connection. We have noticed, too, some of the rights, as well as some of the disadvantages which the relation confers and imposes; let us now, resuming the ordinary course of the negotiation, suppose the agent to have a customer in view, to whom he is endeavoring to make the sale, and see what the effect will be of the representations he may make to secure that end. If the agent professedly acts in that character throughout the transaction, it might seem that the question now raised was one of interest to the immediate parties to the negotiation rather than to him. But this would be assuming that the agent was indifferent to the character of the means employed so that the end was accomplished, and his commissions earned, whilst the assumption that the agent incurs no personal responsibility, under the circumstances mentioned, is, itself, by no means wholly warranted. Since, even though there might be none, so far as the purchaser is concerned, (supposing, of course, that no fraudulent means were used), it would not, therefore, follow that there is no lia-

bility on the part of the agent to his principal for the consequences of a departure from, or violation of his instructions, with respect to such representations.

What we propose now to consider is, what representations the agent may make to the purchaser, in the course of the negotiation, without rendering himself or his principal legally liable, in case of their incorrectness.

By the representations of the agent are meant, not only the actual statements he may make as to any particular facts in question, but also the impressions and belief, his conduct is calculated to produce in the mind of the other party as to such facts. This inquiry will best be answered by noticing some of the grounds on which the courts will interfere to reform or to set aside the contract after it is made, together with some instances of such interference, as illustrations of the general idea sought to be conveyed. Some of these instances will demonstrate the fact, that courts of justice, from the necessity of confining the exercise of their jurisdiction to the concerns of life in their more prominent and tangible aspects, are not always adequate to do exact justice, or to enforce sound morals; but that much must be left to be enforced by those principles of natural justice, which inculcate good faith, candor and truth in all dealings whatsoever. One of these instances is the familiar case in the books, where A, knowing there was a mine on the land of B, of which he knew B to be ignorant, concealed the fact and entered into a contract to purchase the land of B for a price, which the land would be worth, without considering the mine, in which case it was concluded that there was no legal obligation on the

part of A to disclose to B the existence of the mine, and that the contract was binding.[1] In another case it was held, that a party in trying to effect a sale, has the legal right to puff the property in the most extravagant manner and exalt its value to the highest point his antagonist's credulity will bear, and that (under the circumstances of the case), a false representation that the land etc., had cost $40,000, which was far beyond the actual cost, was immaterial.[2] From these cases it might appear, —to use the words of Judge Story—" that human laws are not so perfect as the dictates of conscience, and the sphere of morality is more extended than the limits of civil jurisdiction." On the other hand, there are many duties which belong to the class of imperfect obligations, and are binding on the conscience, but which human laws ordinarily do not, and cannot undertake to enforce, and yet, when the aid of a court of equity is invoked to carry into execution a contract, in extending which aid the court has it in its power to compel the performance of such duties as a condition of its assistance, the principles of ethics will be given a more extensive sway, on the principle that " where a man asks equity he must do equity ;" while if the contract is already performed the same court might not undo or meddle with it.[3]

Notwithstanding this, the fact remains that however much it may be the duty of every man, in point of morals, to disclose to another with whom he is dealing, all the

[1] Fox v. Mackreth, 2 Bro. Ch. 420; see, also, Harris v. Tyson, 24 Pa. 347.

[2] Estes v. Furlong, 59 Ill. 299; Tuck v. Downing, 76 Ill. 71. A moral claim without the basis of a legal or equitable obligation will not be enforced in equity; Morton v. Smith, 86 Ill. 117.

[3] Story's Eq. Jur. 206.

facts which are material to his interests, the courts cannot undertake the execution of such a wide and difficult jurisdiction as the enforcement of these duties would involve.[1]

The grounds on which equity interferes between parties to a contract—so far as we have to do with them—are two, viz.: 1. Mistake, in which for convenience we will include accident; and, 2. Fraud. When contracts are made under a mistake,[2] or ignorance of a material fact, under circumstances material in their character and consequences; or, where by such mistake or ignorance an unconscionable advantage has been acquired,[3] and where there was no gross negligence on the part of the party complaining, either in falling into the error, or in not sooner claiming redress; and no intervening rights have accrued to prevent the parties being put back to their original position, equity will interfere to prevent palpable injustice. But, 1st, the fact must be material; that is, one which is essential to the contract, and an efficient cause of its having been entered into.[4] Thus, if both parties should suppose there was a certain number of acres of land in the premises contracted to be sold, when there was a less number—if the difference would not have varied the purchase in the view of either party—the mistake would not be a material one, in the sense meant. But if the mistake had been in the location of the land, as if supposed to be in one county, instead of that in

[1] Morton v. Smith, 86 Ill. 117.

[2] McClosky v. McCormick et al. 44 Ill. 336; Metropolitan Bank v. Godfrey, 23 Ill. 579; Bohanan v. Bohanan, 3 Bradw. 502.

[3] Bergen v. Ebey, 88 Ill. 269; McArtee v. Engart, 13 Ill. 242.

[4] 1 Story's Eq. Jur. 141, *et post;* Grymmes v. Sanders, 93 U. S. 55.

which it in fact lies, or if the mistake in the quantity of land had been an important one, and the premises were sold by the quantity instead of by metes and bounds, the contract would be set aside.[1] So, where the land was represented to be "about four miles" from the railroad station, when in fact it was over six miles therefrom,[2] and where it was represented that 77 acres out of 107 were under cultivation with growing crops, when less than six acres had been planted, [3] the mistakes were held material.

And in cases of mutual mistake, going to the essence of the contract, it is immaterial that both parties are innocent of any intentional deception. Thus, if a person should sell to another a house and lot, and the house had been burned or destroyed without the knowledge of either party, the sale would be set aside.[4]

2nd. It must be such a fact as the party complaining could not by reasonable diligence get knowledge of when he was put upon inquiry,[5] or which he was prevented from inquiring about by some act of the other party tending to mislead him, or tending to prevent such inquiry.

Thus, taking the case of the mine, it was there held that A was under no obligation to discover to B the fact of its existence, but that each party was acting for himself. But if B, suspecting that A might have discovered a mine on the land, had questioned him about it, and A

[1] 1 Story's Eq. Jur. 141.
[2] Hutchinson v. Johnson, 33 Barb. 392.
[3] Ibid.
[4] 1 Story's Eq. Jur. 209. But if the house had burned after the contract of sale, but before the conveyance, the purchaser must stand the loss. 12 Centr. L. J. 77.
[5] Tuck v. Downing, 76 Ill. 71.

had denied it, or had done something to mislead B and put him off the track of inquiry, the contract would not have been upheld.[1]

So, where the purchaser applied to the owner to purchase a lot of wild land, and represented to him that it was worth nothing except for the purpose of a sheep pasture, when he knew that there was a valuable mine on the lot, of the existence of which the seller was ignorant, it was held that the purchaser had acted fraudulently, and the contract was set aside.[2]

3rd. It must be a fact which the one party was bound to communicate to the other upon the ground of confidence, or such other ground as would make the concealment of the fact fraudulent.[3] But where each party is presumed to exercise his own skill, diligence and judgment with regard to the circumstances, and there is no concealment of facts which the other party had a right to know, and no surprise or imposition exists; or where the fact was equally unknown to both parties; or where each has equal and adequate means of information,[4] or the fact is doubtful from its own nature, the mistake or ignorance, whether mutual or confined to one of the parties, affords no ground for equitable interference, where both have acted in good faith. The apparent inconsistency in the statement that mutual mistakes going to the essence of the contract would be relieved against, with the subsequent statement that where the fact was equally unknown to both parties, equity would not relieve, is explained by the fact that the mutual mistake first

[1] Lord Eldon in Turner v. Harvey, Jac. 178.
[2] Livingston v. Peru, 2 Paige, 390.
[3] Kohl v. Lindley, 39 Ill. 195.
[4] Fish v. Cleland, 33 Ill. 238.

referred to is one regarding a fact which constitutes a material ingredient in the contract of the parties, and so disappoints their intentions by a mutual error as to make the enforcement of the contract a violation of good faith, while the mistake last referred to is one which, though mutual and material, perhaps, as affecting the *value* of the property, involves no violation of conscience, nor any surprise or imposition upon the other party, but was, so to speak, contemplated as a possibility; as where there was a contract by A to sell to B for $100 such an allotment as the commissioners under an enclosure act should make for A, and neither party at the time knew what it would be, and were equally in the dark as to the value, the contract was held obligatory, although it turned out upon the allotment to be worth $1,000.[1]

Under the head of accident or mistake is to be classed the ground for that relief which a court of equity affords in cases of mistake in written agreements, whether executed or executory.[2] "Sometimes the written agreement contains less than the parties intended; sometimes it contains more, and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent."

In all such cases, if the mistake is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties.[3] And if the circumstances denote

[1] 1 Story Eq. Jur. 140 *et post.*

[2] To the unprofessional reader it may be proper to explain that by an executed agreement is meant one which has been carried into effect, and not merely that it is signed.

[3] Mayo v. Dwight, 82 Penn. St. 402; 1 Story's Eq. Jur. 150.

fraud in omitting to reduce part of the agreement to writing, the whole of the agreement is open to parol proof; the court disregards the writing in such case, and treats the whole transaction as a verbal contract.[1] But one party to a written contract, where a condition is purposely omitted, trusting to the oral assurance of the other party that he would perform it, cannot ask to have the contract reformed by inserting that condition, there being neither fraud, accident or mistake.[2] Nor when the clause is designedly omitted from the contract, to depend on the honor of one of the other parties.[3] So, where a deed is drawn entirely in accordance with the intention of the parties, although, from want of skill or knowledge, it will not effect the end proposed, there is no case presented for equitable interference.[4] And it must appear that the contract is different from the understanding of both parties to justify the court in reforming it.[5]

Where the plaintiff had conveyed to the defendant a piece of land, on which was a spring from which the plaintiff's aqueduct supplied his own and other premises with water, which aqueduct was of greater value to the plaintiff than the price received for the land, and he did not intend to part with the right to use the water in the spring, but by mistake no reservation was made in the

[1] 1 Hilliard on Vend. 343.
[2] Andrew v. Sporr, 8 Allen, 412.
[3] Betts v. Gunn, 31 Ala. 219.
[4] 1 Story's Eq. Jur. 164–169; Robertson v. Walker, 51 Ala. 484; Glenn v. Slater, 42 Ia. 107; Girard v. Elbery, 45 Ia. 322. But see Canada v. Marcy, 13 Gray 373; Clemens v. Drew, 2 Jones' Eq. 314; Sparks v. Pittman, 51 Miss. 511; Kostenbader v. Peters, 80 Pa. St. 438.
[5] Nevans v. Dunlap, 33 N. Y. 676; Hunter v. Bilyea, 30 Ill. 228; Ill. Cent. R. R. Co. v. Cassell, 17 Ill. 389.

deed, and the defendant, at the time of the purchase, had no knowledge of the existence of the spring; it was held, that the plaintiff was entitled either to such a conveyance from the defendant as would entitle him to the use of the spring, or else to a reconveyance of the land, upon the repayment of the price.[1] But to justify reforming a deed the proof must be such as to strike all minds alike, as free from any reasonable doubt;[2] and a deed can be reformed only while the interest remains between the original parties, or those buying with notice.[3]

The other ground on which the court will interfere, is that of fraud, either actual or constructive. It is said that courts of equity have never laid down as a general proposition what shall constitute fraud, or a general rule beyond which they will not go upon the ground of fraud. lest other means of avoiding the equity of the courts should be found out.[4]

Actual or positive fraud may be defined to be any cunning, deception or artifice, used to circumvent, cheat, or deceive another, including all intentional acts, omissions and concealments which involve a breach of legal or equitable trust or confidence justly reposed, and which are injurious to another, or by which an undue advantage is taken of him.[5]

Constructive fraud includes such acts or contracts, as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon

[1] Brown v. Lamphear, 35 Verm. 252.

[2] Edmunds' Appeal, 59 Pa. St. 220; Vreeland v. Bramhall, 28 N. J. Eq. 85; Fladcke v. Mayor, etc. 28 N. J. Eq. 110.

[3] Adams v. Stevens, 49 Me. 362; Prescott v. Hawkins, 16 N. H. 122.

[4] Lewis v. Lanphere, 79 Ill. 187.

[5] 1 Story's Eq. Jur. 186 *et post.*

other persons, yet, by their tendency to deceive or mislead them, operate substantially as a fraud upon their private rights, interests or intentions.[1] Every man must be held responsible for the consequences of a false representation, upon which any one so acting suffers loss or injury, provided it appears that the representation, even though not known to be false, was made positively, as if known to be true, and with the direct intent that it should be so acted upon,[2] and in the manner which occasioned the injury or loss, and where such loss or injury is the direct and immediate consequence of the representation so made.[3] Within this rule, a party is answerable for all the consequences of his illegal or wrongful acts, in the ordinary and natural course of events, though these consequences be directly brought about by the intervening agency of others, provided the intervening agencies were set in motion by the primary wrongdoer, or, provided the immediate acts causing the damage are the necessary and natural consequences of the original wrongful act.[4] Whether the party misrepresenting a material fact, knew it to be false, or only made the assertion without knowing whether it were true or false, is immaterial,[5] if the statement is relied on by the other party; for the affirmation as true, of what one does not know or believe to be true, is equally in morals as in law as unjustifiable as the affirmation of what is known to be positively false.[6]

[1] Ibid. 258 and 259.

[2] Beebe v. Knapp, 28 Mich. 53.

[3] 1 Story's Eq. Jur. 1906.

[4] Philpot v. Taylor, 75 Ill. 309; Winter v. Baudel, 30 Ark. 362; Safford v. Grout, 120 Mass. 20; Righter v. Roller, 31 Ark. 170; Selma, etc. R. R. Co. v. Anderson, 51 Miss. 829; Will v. Carley, 15 N. Y. 636; Brownlee v. Hewitt, 1 Mo. App. 360.

[5] Provided this ignorance was the result of negligence or want of care or diligence on his part. 1 Pars. on Cont. 65.

[6] Nelson v. Taylor, 40 How. (N. Y.) Prac. 355.

And even if a party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party.[1] The party selling property must be presumed to know whether the representation which he makes of it is true or false; if he knows it to be false, then he commits a positive fraud, but if he does not know whether it is true or false, then it can only be from gross negligence; and in contemplation of law, a representation founded on a mistake resulting from such negligence is fraud.

The purchaser confides in it upon the assumption that the owner knows his own property, and truly represents it, and it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud, the injury to him is the same, whatever may have been the motive of the seller.[2] But if the seller in such case had not assumed to make the representation as a fact, or as within his own knowledge, but had, if relying on information from a third party, so stated, or had qualified his representation by explaining the source of his information, or the grounds of such representation, in good faith, then the consequences above indicated would not follow, because the law does not make the seller responsible for

[1] 1 Story Eq. Jur. 195; Wierich v. De Zoza, 2 Gilm. 385; Du Flon v. Powers, 14 Abb. (N. Y.) Prac. 391. But when by an ordinary degree of precaution the defendant might have ascertained the falsity of the representations complained of, they do not amount to fraud. Dunbar v. Bonested, 3 Scam. 32; Sims v. Klein, Breese, 234; White v. Watkins, 23 Ill. 480. See, also, Frenzel v. Miller, 37 Ind. 1; Elder v. Allison, 45 Ga. 13; Sims v. Ferrill, 45 Ga. 585; Goodwin v. Robinson, 30 Ark. 535; Bird v. Kleiner, 41 Wis. 134.

[2] Hilliard on Vend. 329. See, however, Dunbar v. Bonested, 3 Scam. 32; Mitchell v. Deeds, 49 Ill. 416; Fauntleroy v. Wilcox, 80 Ill. 477; Tone v. Wilson, 81 Ill. 529; St. Louis, etc. R. R. Co. v. Rice, 85 Ill. 406.

every unauthorized, erroneous or false representation made to the purchaser, unless also fraudulent.[1] But, as has been said before, where one has made a representation positively, or professing to speak from his own knowledge on the subject, whereas he had no such knowledge, the intentional falsehood is disclosed, and the intention to deceive is also inferred.[2] The misrepresentation, however, must be in a matter of substance, or importance to the interests of the other party, and the party must have been actually misled by them,[3] and have been injured by them.[4] If the misrepresentation be of a trifling or immaterial thing, or if the other party did not trust to it,[5] or if he knew the representation to be false when made,[6] or if it was vague and inconclusive in its nature, or if it was upon a matter of opinion or fact, equally open to the inquiries of both parties,[7] and in regard to which neither could be presumed to trust the other,[8] the court will not interfere.

[1] Kohl v. Lindley, 39 Ill. 195; Mitchell v. Deeds, 49 Ill. 416; Wheeler v. Randall, 48 Ill. 182; Furman v. Titus, 40 (N. Y.) Sup. Ct. 284; Dunn v. White, 63 Mo. 181; Dulaney v. Rogers, 64 Mo. 201; Stitt v. Little, 63 N. Y. 426; Taylor v. Leith, 26 Ohio St. 428; Merchants' N. Bank v. Sells, 3 Mo. App. 85; St. Louis, etc, R. R. Co. v. Rice, 85 Ill. 406.

[2] Hilliard on Vend. 328.

[3] Merwin v. Arbuckle, 81 Ill. 501; Fauntleroy v. Wilcox, 80 Ill. 477; High v. Kistner, 44 Ia. 79; White v. Sutherland, 64 Ill. 181.

[4] Bartlett v. Blaine, 83 Ill. 25; Freeman v. Venner, 120 Mass. 424; Bremond v. McLean, 45 Tex. 11.

[5] Fauntleroy v. Wilcox, 80 Ill. 477; Bond v. Ramsey, 89 Ill. 29; White v. Watkins, 23 Ill. 480; Bowman v. Caruthers, 40 Ind. 90.

[6] Guardian Life Ins. Co. v. Hogan, 80 Ill. 35.

[7] 1 Story's Eq. Jur. 193 and 201; Tuck v. Downing, 76 Ill. 71; Morrison v. Koch, 32 Wis. 254; Holbrook v. Conner, 60 Me. 578; Bauta v. Savage, 12 Nev. 157; Shackelton v. Lawrence, 65 Ill. 175.

[8] Noelting v. Wright, 72 Ill. 390; Merwin v. Arbuckle, 81 Ill. 501. But otherwise if the other party relies upon it. White v. Sutherland, 64 Ill. 181.

Neither will a willful misrepresentation, even, always be a ground for the avoidance of the contract, as if it be of such a nature that the other party had no right to place reliance on it, and it was his folly to give credence to it; for courts do not aid parties who will not use their own sense and discretion upon matters of this sort.[1] Of this nature are the puffing and commendation of his property by the seller, and false statements (it is said) in regard to its value, or the price which has been offered for it.[2] The same general principles apply, whether the fraud is perpetrated by the party, or his agent, by his authority, or if perpetrated by the agent without any authority, if the act in which the fraud was committed be adopted by the principal,[3] and so even if the agent exceeded his authority.[4]

A sale procured by fraud and misrepresentation of the seller or his agent is not absolutely void, but only voidable at the option of the purchaser. This option must be exercised as soon as the fraud is discovered, or within a reasonable time thereafter; and he cannot rescind in part and affirm as to the residue. So, if he would rescind the contract, the purchaser must restore or offer to restore whatever he has received under it, in substantially the same condition in which it was received. Inadequacy of price, unless so gross and inadequate as to shock the conscience and convince the judgment that there has been

[1] 1 Story's Eq. Jur. 195; Tuck v. Downing, 76 Ill. 71; Frenzel v. Miller, 37 Ind. 1; Morehouse v. Yeager, 41 N. Y. Sup. Ct. 135.

[2] Hilliard on Vend. 338.

[3] Roberts v. Hughes, 81 Ill. 130.

Warren v. Doolittle, 61 Ill. 171; Fisher v. Dillon, 62 Ill. 379; Shackelton v. Lawrence, 65 Ill. 175.

imposition and fraud, is not ground for interference by the court on behalf of the purchaser.[1]

Where the agent induced the defendant to enter into the contract, believing that the former was acting wholly in his behalf, whilst in fact he was secretly in the employ and acting for the interest of the plaintiff, his principal, it was held that the plaintiff could not hold the defendant bound by his agreement.[2]

The effect upon the principal of misrepresentations made by his agent may be summed up as follows: Where the *acts* of the agent will bind his principal, there his representations and declarations will also bind him, since in such case the representations and declarations of the agent are treated as those of the principal.[3]

This rule applies not only to the acts, representations and declarations of the agent, but even to his fraudulent statements, misrepresentations and concealments concerning the subject-matter, when a part of the *res gestæ* —that is, when made during the negotiation, and forming a substantial inducement to its consummation.[4]

As intimated, this doctrine of the liability of the principal for the representations, etc., of his agent is limited to cases where the principal would be bound by the acts of his agent. So far as the agent is held out to the public or to third persons dealing with him as competent to contract for and bind the principal, the latter will be bound by the acts of the agent.[5]

In noticing the difference between a general and a

[1] 1 Story Eq. Jur. 246; 13 Ill. 242.
[2] Cassard v. Hinman, 6 Bosw. (N. Y.) 8.
[3] Story on Ag. sec. 134.
[4] Ibid. 139, 432.
[5] Ibid. 133.

special agency with respect to the presumed authority of the agent, we saw that in the case of a general agency the principal would be bound by the acts of his agent within the scope of the general authority conferred upon him, although he should even violate or disregard the private instructions designed to limit or qualify the exercise of such authority; while in a special agency, if the agent exceeds the special or limited authority conferred upon him, the principal is not bound by such acts, unless he has held out the agent as possessing a more enlarged authority;[1] as, for instance, if the principal should give the agent a power of attorney to sell a particular piece of property at such price and on such terms as he might see fit, and on such sale to execute deeds of conveyance, etc.,[2] this would be what might be called a general authority, though the agency is but a special one, in that it is limited to the sale of one particular property. On the other hand, it was held that where an agent entrusted with money to loan at *legal* interest, exacted a bonus for himself without the knowledge of his principal, it did not constitute usury in the latter, and that the enforcement of the security taken for the loan did not operate as a ratification of the agent's wrongful act.[3] Thus we see that the character of the agency does not afford the true or only criterion by which to test the question of the liability of the principal for the acts, and therefore for the representations, of his agent, but that the liability of the principal is better measured by the extent to which

[1] Story on Ag. sec. 126.
[2] Ibid. sec. 133.
[3] Condit v. Baldwin, 7 Smith (N. Y.) 219.

he has held out the agent, to third persons, as authorized to act for him.[1]

The effect of the ratification by the principal of the acts of the agent has been already noticed.[2] It only needs to be added that the adoption of the end or result involves the adoption of the means used in accomplishing that end.[3]

A principal is so far liable for the acts of his agent that he cannot take any benefit from any misrepresentation fraudulently made by his agent, although the principal was ignorant of the fraud; and, on the other hand, if the party dealing with such agent suffer loss from such fraud, the principal is bound to make him compensation, provided the agent acted in the matter as his agent, and within the authority which he was held out to have.[4]

Next, as to the consequences to the agent himself of his representations. It was said that the assumption that the agent assumes no responsibility to third persons, when acting in the character of agent for his principal, was not wholly warranted. So far from it is this the fact, that on the principle that one man cannot lawfully authorize another to do a wrongful act, it follows that the agent would be liable for his misrepresentations in the same manner and to the same extent as would the principal if made by him, and that, even though such misrepresentations were made ignorantly, and without intentional wrong, and by the authority of the principal.[5]

[1] Story on Agency, secs. 129, 143; St. Louis, etc. Packet Co. v. Parker, 59 Ill. 23; Walsh v. Hartford Fire Ins. Co. 73 N. Y. 5.

[2] *Ante*, p. 54 *et post.*

[3] But these means must be known to the principal to make the ratification binding upon him (p. 57 *ante.*) 1 Pars. on Cont. 73.

[4] 1 Story on Ag. sec. 309 *et post;* Crane v. Onderdonk, 67 Barb. 47.

If the misrepresentations were known to be such by the agent, then, although authorized and directed to make them by the principal, he would not even have any redress as against the latter, because it would be contrary to the policy of the law, as well as to sound morals, to afford indemnity for the willful doing of a wrongful act.[1] But if the agent acted innocently and in good faith, the principal would be bound to indemnify him for any damage he may suffer in consequence of the misrepresentations made by him with the authority of the principal.[2]

There is a distinction between acts of misfeasance, such as we have been considering, on the part of the agent, and acts of nonfeasance, or neglect or omissions of duty. In these latter third parties have no interest as against the agent, but the liability of the agent with respect to them would be solely to his principal.

What has been said with regard to the personal liability of the agent to third parties has been confined to a liability arising during the negotiation. We shall hereafter have occasion to refer to the circumstances under which he may incur such liability by virtue of the contract entered into as a result of the negotiations.

[1] Story on Ag. sec. 308, note. [2] Ibid.

CHAPTER V.

THE REAL ESTATE AGENT.

AS TO THE ESSENTIALS TO A BINDING CONTRACT FOR THE SALE OF LAND, ETC., WITHIN THE STATUTES OF FRAUD.

First—As to the form of the instrument.

A note or memorandum is all that is required, not a formal agreement. A letter signed and containing the necessary particulars of the agreement is sufficient. Several letters or other writings may be taken together to make up the memorandum mentioned in the statute; and a letter or other writing signed by the party may be taken in connection with a previous writing not signed, but the mutual relation of the several writings must appear upon their face.

An offer by letter, of the party to be charged, may be proved to have been accepted by parol so as to complete the agreement. It is immaterial whether or not the memorandum is written in pencil or ink, or is printed; and it may be signed at any time before action brought.[1]

Second—As to the contents of the memorandum.

It must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without resorting to parol evidence to show the intentions of the parties[2]; but the ordinary incidents

[1] Browne on Stat. of Frauds, sec. 344 *et post.*

[2] Ibid.

of an agreement, as, for instance, the usual covenants and other ingredients of a complete transfer in the sale of land will be supplied by the court.[1] It must import an agreement actually made. If it show a treaty pending and not a contract concluded; or if referring to the alleged agreement it repudiates it and declares it not binding, or referring to it annexes conditions, or otherwise makes variations, it has no effect as a memorandum to bind the party from whom it proceeds.

But where a party wrote a letter referring to a prepared draft of an agreement, but declining to sign it on the ground that his "word was as good as his bond," the latter, coupled with the draft, was held a sufficient agreement.

So, where one in a letter disputes the binding existence of an agreement, the letter may be taken in connection with a subsequent one from the other party insisting upon its performance, so as in the whole to make out positive proof, *as against the latter*, of the agreement which he had insisted upon.

The memorandum must contain the names of both the contracting parties, that it may appear between whom the contract was made, but no formality is required in this particular; it is sufficient if, upon the memorandum, in addition to its having the signature of the party to be charged, it appears with reasonable certainty who the other party is. Thus, a letter addressed by one party to, or received by him from the other, and sufficiently connected in meaning with the other writings, relied upon

[1] Barry v. Coombe, 1 Peters 656; Symes v. Hutley, 2 L.T.(N. S.) 509.

as constituting the memorandum, may be evidence to show the other to be a party to the contract.

The price agreed to be paid is an essential part of the contract, and must be shown in the memorandum, and so must the terms of payment. And the land which is purported to be bargained for, or sold, must be so described that it may be identified; so any term or interest therein which is the subject of the agreement must be mentioned.

As to the necessity of setting out the consideration upon which the defendant's promise is made, the authorities are not agreed.

In New Hampshire, New York, New Jersey, Maryland, South Carolina, Georgia, Michigan and Wisconsin it is held to be necessary, whilst in Connecticut, Massachusetts, Ohio, Missouri, Indiana, Illinois (since the statute of 1874), and in most of the unnamed States, it is sufficient at least that the writings should disclose the fact that a consideration existed, leaving the actual consideration to be shown by parol.[1]

Third—As the object of the statute is merely to authenticate the genuineness of the document, the place of signature by the party to be charged thereon is immaterial. It may be at the top, in the body or at the bottom, provided it be inserted in such a manner as to authenticate the instrument as his act, or amount to an acknowledgment that it is his agreement, and be intended as his final signature.[2] Thus, where a person commenced

[1] Brown on Stat. of Frauds, sec. 344 *et post.*

[2] But this is not necessary in Maryland. Hingdon v. Thornds, 1 Harr. and Gill. 139.

a memorandum of agreement in the third person as "Mr. A. B. proposes," etc., the agreement was held sufficiently signed by him.[1]

The signatures may be in pencil, or by initials (when confirmed by evidence of their meaning, and which may be by parol) or by mark, or by telegram,[2] or when one is in the habit of using instruments with his name printed in them, this will be his signature.[3]

In New York, however, the signatures must be at the foot of the instrument,[4] and an actual manual subscription is necessary, and a printed signature would be insufficient there.[5] Such, briefly, are the conditions necessary to a binding contract within the provision of the section of the Statute of Frauds, which provides that "no action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorized in writing."

The construction of the statutes of frauds of those

[1] Brown on Stat. of Frauds, Sec. 357.

[2] As to contracts by telegraph and the signature required by Statute of Frauds in cases of telegram see 12 Centr. L. J. 365; and as to power of court to order production of telegraphic messages, see 11 Centr. L. J. 491.

[3] Pars. on Con., 8–13; Wain v. Walters, 2 Sm. L. C. 307; Brown on Stat. of Frauds, Sec. 357.

[4] James v. Patten, 2 Seld. 9.

[5] Vielie v. Osgood, 8 Barb. 132; Davis v. Shields, 26 Wend. 3. If the terms of a contract are agreed upon, and a paper signed in blank by one of the parties, who leaves it to the other to fill up, and the latter fills it up in a different manner from that agreed upon, the paper can have no force as a written contract. Rounsavelle v. Pease, 45 Wis. 506.

States which require that the authority of the agent shall be in writing, signed by the party to be charged, as to the form, contents and signing of such written authority, is governed substantially by the same rules which we have seen applied to the requirements of the statute with respect to the contract or memorandum itself; and what has been said in that connection is equally applicable to the writing conferring the authority on the agent, with such modifications as the different circumstances of the cases will readily suggest.

But the question naturally arises, as to what, if any, liability the agent assumes in executing a contract for the sale of lands on behalf and in the name of his principal, where his authority so to do is not in writing signed by his principal, as required by the statutes of Illinois, Pennsylvania, etc. It must be confessed that this question is one not free from difficulty. It is said by Mr. Story that "wherever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, he will in some form of action be personally responsible therefor to the person with whom he is dealing for or on account of his principal, both for the amount of the contract and for the costs incurred, if any, by the other party in a fruitless suit against the supposed principal."

And further, "that there can be no doubt that this is or ought to be the rule of law in the case of a fraudulent representation made by the agent, that he has due authority to act for the principal; for it is an intentional deceit," and "that the same rule may justly apply where the agent has no such (*i. e.*, *due*) authority, and

he knows it, and he nevertheless undertakes to act for the principal, although he intends no fraud," because "every person so acting for another, by a natural, if not by a necessary implication, holds himself out as having competent authority to do the act." "In short, the signature of the agent amounts to an affirmation that he has authority to do the particular act; or, at all events, that he *bona fide* believes himself to have that authority," etc.[1]

There can be no doubt as to the liability of the agent who should, on being questioned as to the fact, falsely assert that he had a written authority to sign the contract; but this is not the precise question we are considering. It is a fact, that in a large proportion of cases, the agent signs the contract either under an express, though verbal, authority to do so, or under the authority implied from his authority to sell, and nothing is said, either by the agent or the purchaser, as to whether the agent has *written* authority or not. And it is to this class of cases that the question of the agent's liability is addressed. Indeed, so prevalent is this practice, and so general this usage among real estate brokers, especially in the larger cities, that it admits of question whether it can be fairly and truthfully said, that *in fact* the agent, "by a natural, if not by a necessary, implication, holds himself out as having competent" (in the sense of *written*) "authority," or that "the signature of the agent" (in such cases) "amounts to an affirmation that he has" *written* "authority to bind his principal;" and the purchaser being presumed to know the

[1] Story on Ag. sec. 264–277.

requirements of the statute, and at the same time the usage among real estate brokers, it would seem to be his duty to inquire as to the character of the authority possessed by the agent, if he would acquit himself of the obligation to use reasonable precaution and prudence. And it is conceded that "this doctrine as to the liability of the agent, where he contracts in the name and for the benefit of his principal, without having due authority, is founded on the supposition that the want of authority is unknown to the other party."

But, it is said, "the person who assumes to contract as agent for an individual or corporation must see to it that his principal is legally bound by his act; for if he does not give a right of action against his principal, the law holds him personally liable."[1]

To this it may be objected, that the truth of the proposition, "that if the agent does not give a right of action against his principal, the law holds him personally liable," is by no means admitted to the full extent claimed,[2] but that, if the authority of the agent exists *in fact*, though inoperative in law to bind the principal, no recovery can be had against the agent.[3]

It may be urged, that the same statute which requires the agent's authority to be in writing, also requires the *contract itself* to be in writing, to be binding on the

[1] Story on Ag. sec. 277.

[2] Ibid. sec. 280, 274a; Hopkins v. Mehaffey, 11 Serg. & R. 128.

[3] Thomson v. Davenport, 2 Smith's L. C. 366; Walker v. Bank of St. of N. Y. 5 Seld. 582; Sheffield v. Ladne, 16 Minn. 388; Story on Ag. sec. 264, note 1 and cases there cited; Duncan v. Niles, 32 Ill. 532; Leery v. Locks, 29 Ill. 313; Abbey v. Chase, 6 Cush. 54; Leroux v. Brown, 12 C. B. 801; Aspinwall v. Torrence, 1 Lans. 381; Smout v. Illberry, 10 M. and W. 1.

principal; that nevertheless the statute does not make the contract void, nor even voidable; the nature of the contract is in no wise changed; if it would be good at common law, it remains good now, for all cases except that expressly negatived by the statute. Nor, on the other hand, does the statute make that good which would not be good without it.[1] In other words, that the aim of the statute is not to make or unmake contracts for parties, but merely to prescribe the evidence by which the existence of the contract shall in certain cases, *i. e.*, where suit is brought thereon, be established; and that the contract may be legal, although it may not be actionable, or capable of being enforced.

That at common law a contract for the sale of land could be made by parol,[2] and the *contract*, therefore, as such, is unaffected by the statute, and it is valid as to third persons, although the statute has not been complied with; and if the contract has been fully executed, the statute has no power over it whatever, and no effect upon the rights, duties and obligations of the parties to it;[3] but simply that so long as the contract is executory, it cannot be used against the party to be charged thereon, unless the provisions of the statute have been complied with.

So, in like manner, the aim of the statute is not to make or unmake the authority of the agent, but only to prescribe what shall be evidence of that authority, in case the contract made pursuant thereto is sought to be

[1] Browne on Stat. of Frauds, sec. 115.

[2] Collins v. Smith, 18 Ill. 160; Esmay v. Gorton, 18 Ill. 483; Proudfoot v. Wightman, 78 Ill. 553.

[3] 3 Pars. on Cont. 57 *et post.*

enforced against the principal. That since it was not necessary at common law that the authority of an agent to sell lands should be in writing,[1] it is not necessary now that the authority as *such* should be in writing, and that the only consequence of the authority being verbal instead of in writing is, that while the verbal authority is inoperative in law to bind the principal, it nevertheless exists in fact, and if it exists in fact, the agent cannot be responsible in the case in question.

And further, that the statute, by its terms, only relates to cases where suit is brought against the party to be charged on the agreement itself, and since the agent is admittedly not a party thereto on its face (where the contract is made in the name of the principal) he is not within the purview of the statute.

Where one wrote across a draft an acceptance in the name of his principal, by himself as agent, but which acceptance, although authorized in fact, did not in law bind the principal, it was held, that unless the agent used the name of his principal without authority in fact, he could not be held personally bound.[2] And in reviewing the New York authorities on the subject, the court said, as the result of that review, it appeared "that all the cases which hold the agent, professedly acting in that capacity, personally bound, unequivocally show that misrepresentation and imposition lie at the foundation of the doctrine, and that it does not extend to cases where there is no mistake, misrepresentation or deception as to some matter of fact, although for some legal reason the principal may not be bound."

[1] Brown on Stat. of Frauds, sec. 14.

[2] Walker v. Bank of State of N. Y. 5 Seld. 582.

That the court referred to positive and actual misrepresentation, etc., as distinguished from the constructive misrepresentation referred to in the statement that "the signature of the agent amounts to an affirmation of the agent that he has due authority to bind his principal," is apparent from the language which follows, viz: "That one party is presumed to know the law as well as the other, and each contracts at his peril as to the legal effect of what is done; and further, that the law will not presume want of legal authority." "Fraud and misrepresentation are always to be proved, and are never presumed, and in every case where the agent was so held personally liable, it appeared that he had no authority *in fact* to bind his principal." So, in another case, it was held that "the onus of proving want of authority, where the agent executes a contract in the name of his principal, lies on the party claiming the want of authority."[1]

It is conceded that, in general, where one signs an agreement in the name and professedly as agent of another, without authority from the latter, the agent will not be liable upon the contract itself,[2] but that any action against him must be based either on the implied warranty of authority, or on the ground of deceit or fraud. In Illinois, Pennsylvania, and some of the other States, the remedy would be confined to an action on the case for the deceit, and consequently, when the agent has acted in good faith, there can be no recovery.[3]

In such cases *it would seem* that where the agent has signed a contract in good faith, in the name of his prin-

[1] Plumb v. Milk, 19 Barb. 71.

[2] 2 Sm. L. Cases, note to Thomson v. Davenport; Story on Ag. sec. 264a and note.

[3] Duncan v. Niles, 32 Ill. 532.

cipal, pursuant to his authority, though it be but a verbal one, he incurs no personal responsibility to the purchaser in the event of the principal's refusing to carry out the sale on the ground that the agent had not written authority to bind him, provided there has been no fraud, deception or concealment practiced by the agent with reference to the character of the authority possessed by him, and nothing done to induce the purchaser to believe that it was in writing.

And yet this view, it must be conceded, involves so far the existence of a usage among agents to sign contracts on a merely verbal authority, and an acquaintance with this usage on the part of the purchaser, as to render it far from either safe or satisfactory for general acceptance. Inasmuch, however, as the doctrine of personal liability on the part of the agent under the circumstances mentioned, *i. e.*, in the absence of any actual misrepresentation or fraud, is conceded to be based on the want of knowledge by the purchaser, of the fact that the authority of the agent is but a verbal one, the agent will always have it in his power to prevent any question on this point, by frankly and fully explaining the character of the authority under which he signs,[1] and if the purchaser is not satisfied therewith, and the principal will not give a written authority, or himself execute the contract, the broker's duty with respect to the execution of the contract is discharged as fully and effectually as if the transaction had been consummated.

If the broker signs the contract in the name of the

[1] Murray v. Carothers, 1 Metc. 71; McCurty v. Rogers, 21 Wis. 197.

principal, in his presence, and by his order, the provision of the statute would not apply, since such signature is in law the signature of the principal himself, and not of the agent,[1] but in such cases the agent's name should not appear at all.

[1] Meyer v. King, 29 La. Ann. 365.
569. See, also, 12 Centr. L. J.

CHAPTER VI.

THE REAL ESTATE AGENT.

FIRST—OF THE LIABILITY OF THE AGENT IN CONNECTION WITH THE CONTRACT.

SECOND—OF THE MANNER OF EXECUTING THE CONTRACT.

First—As to how an agent may incur a personal liability to third persons.

It might seem that somewhat under this head has been anticipated while we were discussing the effect of the agent's representations; but the present purpose is to consider the acts and representations more immediately connected with the making and signing of the contract which is the result of the negotiation, rather than his conduct during the negotiation.

The cases in which the agent has been held to be personally responsible in the connection with which we have now to do are:

1st. Where the agent makes a fraudulent representation of his authority, with intent to deceive.[1] In such cases, the authorities are agreed that the person so acting is personally liable in an action of deceit for the false representations, not only for the amount of the contract, but also for the costs incurred in a fruitless action against the supposed principal.[2]

2nd. Where he has no authority, and knows it, but

[1] Smout v. Illberry, 10 M. & W. 1.

[2] Story on Ag. sec. 264.

nevertheless makes the contract as having such authority; as, where, without having actual authority, he assumes to act for his principal, presuming that the latter will recognize and adopt the act as his own.

In such case, there need be no fraudulent intent, but, having no authority in fact, even though he acts *bona fide*, he does a wrong to the other party by misleading him, and it is a principle of equity, that where one of two innocent persons must suffer a loss, he ought to bear it who has been the sole means of producing it.[1]

3rd. Where, not having, in fact, authority to make the contract as agent, he yet does so, under the honest belief that such authority is vested in him; as in the case of an agent acting under a forged power of attorney, which he believes to be genuine, and the like.[2] The general rule would be, that the person so acting would be personally liable, on grounds similar to those last stated, and on the further ground (as sometimes held), that he has impliedly warranted that he possessed the authority which he professed to have.[3] But to this rule there are some exceptions; as where the agent had an original authority to do an act, but it turns out, unknown to either the agent or the other party to the contract, that the principal was dead, thus revoking the agent's authority. In such case, the contract being made on the assumption that the principal is still living, the agent is only understood to stipulate for good faith, and that he had in such case authority to make the contract.[4]

[1] Story on Ag. sec. 264.
[2] Smout v. Ilberry, 10 M. & W. 1.
[3] Story on Ag. sec. 264; Noe v. Gregory, 7 Daly 283.
[4] Story on Ag. sec. 265; Smout v. Ilberry, *supra*.

Indeed, the doctrine contained in this third division is wholly denied in those States where, as in Illinois, Massachusetts and Pennsylvania, the remedy would be confined to an action for deceit, since, from the form of the proposition, the existence of any fraud or deceit is expressly negatived; from which it follows, that in such States, where a person professes to act as agent, disclosing his principal, he assumes no personal responsibility unless he acts fraudulently.[1]

But where the law allows a recovery on the ground of an implied warranty of authority, as in New York, (according to the later authorities) and in Alabama, Minnesota, California and Ohio,[2] the agent may be held liable notwithstanding the absence of any fraudulent or wrongful intent.

In general, the doctrine held in this country is that an agent who enters into a simple contract without authority,[3] or exceeds the authority which he has,[4] binds himself, and becomes personally liable as principal.

But it is generally conceded that no recovery can be had against the agent, where the authority claimed existed *in fact*, though it was inoperative in law.[5] So, where he

[1] Levy v. Locks, *supra;* Duncan v. Niles, *supra;* Baker v. Chandlers, 4 Green. 428; Sholwell v. McKown, 5 N. J. Law. 828; Meadows v. Smith, 12 Ired. (N. C.) L. 18; Hull v. Huntoon, 17 Verm. 244; Hegeman v. Johnson, 35 Barb. 200; Ogden v. Raymond, 22 Conn. 379; Powell v. Finch, 5 Yerg. 446.

[2] White v. Madison, 26 N. Y. 117; Hall v. Cockrill, 28 Ala. 507; Bass v. Randall, 1 Minn. 404; Sayre v. Nichols, 5 Cal. 487; Titus v. Kyle, 10 Ohio, 444.

[3] Meech v. Smith, 7 Wend. 315; Roberts v. Bratton, 14 Verm. 192; Royce v. Allen, 28 Verm. 234; Bay v. Cook, 2 N. J. 343; Bank of Hamburgh v. Way, 4 Stobk. 87; Layng v. Stewart, 1 W. & S. 222.

[4] Foster v. Heath, 11 Wend. 478; Moore v. Wilson, 6 Foster 335.

[5] Walker v. Bank of St. of N. Y. *supra;* Story on Ag. sec. 302, and cases there cited; Thomson v. Davenport, 2 Sm. L. C. 366.

discloses all the circumstances, and is guilty of no concealment or misrepresentation,[1] or where his want of authority is known to the other party,[2] he would not ordinarily be held personally liable,[3] unless he had entered into such a contract as by its form will bind him at all events.

But if the agent does not disclose his agency and name his principal, he becomes himself the principal,[3] unless, as before stated, the fact of the agency is otherwise known to the other party. So, if a person should state himself to be an agent, but have really no principal, he will himself be liable on the contract, if there are apt words to bind him, or else on the implied warranty of authority, or in an action of deceit.[4] And in such cases, if the contract contains apt words to bind the agent, they may be taken, and the rest rejected, and where the question whether the agent is bound is ambiguous on the face of the instrument, the want of authority may turn the scale against him.[5]

But in Illinois, Pennsylvania and Massachusetts, it has been held, that unless there are apt words to charge the agent as principal, the remedy against the agent would be by an action on the case for the deceit, and not

[1] Ogden v. Raymond, 22 Conn. 379; Sinclair v. Jackson, 8 Cow. 585; Murray v. Carothers, 1 Metc. 71.

[2] Chase v. Debolt, 2 Gilm. 371; Warren v. Dickson, 27 Ill. 115; Story on Ag. sec. 265.

[3] Wheeler v. Reed, 36 Ill. 81; Milliken v. Jones, 77 Ill. 352; Warren v. Dittson, 27 Ill. 115; Merrill v. Wilson, 6 Ind. 426; Pierce v. Johnson, 34 Conn. 274; McClellan v. Parker, 27 Mo. 162; Royce v. Allen, 28 Verm. 234.

[4] Meech v. Smith, 7 Wend. 315; Epis. Ch. of St. Peter v. Variance, 28 Barb. 644.

[5] Draper v. Mass. Steam Heating Co. 5 Allen, 338; Curts v. Scoles, 1 Ia. 474; Jones v. Dowman, 4 Q. B. 235; Duncan v. Niles, 32 Ill. 532.

on any contract; consequently, when he acts in good faith, under a mistaken impression, there is no remedy against the agent.[1]

Thus, the following instrument was executed without authority:

"BELLEVILLE, ILL., 1st Aug., 1860.

"$10,000. On or before the 1st day of August, 1861, the county of St. Clair, Ill., promises to pay John J. Anderson & Co., of St. Louis, Mo., the sum of ten thousand dollars for value received, negotiable and payable without defalcation or discount at the Bank of Commerce, in New York City, with interest from date at the rate of ten per cent per annum.

"NATHANIEL NILES,
"*County Judge of St. Clair County.*"

and it was held the contract was void, and neither party could be held by it; not the county, for it gave no authority to the judge to bind it; not the judge, for there were no apt words in it sufficient to bind him, and there was no evidence of any intention to deceive on his part.[2] The liability of the agent, when he contracts in the name and for the benefit of his principal, without having due authority, is founded on the supposition that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of

[1] Abbey v. Chase, 6 Cush. 56; Jefts v. York, 4 Cush. 371; Hopkins v. Mehaffey, 11 Serg. & R. 129.

[2] Duncan v. Niles, *supra*. In such cases the law will not presume want of legal authority. Fraud and misrepresentation are always to be proved, and are never presumed. Walker v. Bank of St. of N. Y. *supra;* Plumb v. Milk, *supra*. To same effect as Duncan v. Niles, see Carrington v. Mittington, 26 Mo. 313; Tefts v. York, 10 Cush. 395; Sherman v. N. Y. Cent. R. R. Co. 22 Barb. 339; Hancock v. Yonker, 83 Ill. 208; Ogden v. Raymond, 22 Conn. 379; Murray v. Carothers, 1 Metc. 71; Mann v. Richardson, 66 Ill. 481; Wicker v. Boynton, 83 Ill. 545; Dunton v. Chamberlain, 1 Bradw. 361; Broadwell v. Chapin, 2 Bradw. 511, and Levy v. Locks, *supra*.

the contract by the principal. If, therefore, at the time of the contract, the agent should declare that he had no authority, but thought his principal would ratify the act, and at the same time explain that he did not in any event intend to bind himself personally, there would seem to be no ground to hold the agent liable, at least in those States where the remedy against the agent must be by an action on the case, and not on the contract.[1]

And to sustain an action to hold the agent personally liable on a contract made by him as agent, on the ground that he made it without authority, the contract must be one which could be enforced against the principal if he had given the proper authority. If the principal could defend on the ground of want of a memorandum in writing, for instance, the agent could do the same thing [2]

But, since at common law the authority of the agent to execute a deed or instrument under seal must have been conferred by some instrument itself under seal, it follows that if the agent, without such authority, should execute for his principal an instrument necessarily under seal, he would not come within the protection of the doctrine applicable to simple contracts.

The principal can maintain an action in his own name on a written contract made by his agent in the latter's

[1] See, generally, on this subject, Taylor v. Shelton, 30 Conn. 132; Long v. Colburn, 11 Mass. 97; Ballow v. Talbot, 16 Mass. 461; Savage v. Rix, 9 N. H. 263; Byars v. Doores, 20 Mo. 284; Coffman v. Harrison, 24 Mo. 524: Clark v. Foster, 8 Verm. 98; Moore v. Wilson, 26 N. H. 332; Dennis v. Butlitt, 1 Blackf. 241; Sheldon v. Dunlap, 16 N. J. Law. 245, and cases cited in Story on Ag. sec. 264, note. But for other reasons familiar to the professional reader, this explanation should be incorporated in the contract, when the latter is in writing.

[2] Battzen v. Nicolay, 53 N. Y. 469.

name, without disclosing the principal's name.[1] And he can show by parol evidence that the agent was in reality acting for him, although the contract was in writing, and executed by the agent in his own name.[2]

It has already been stated that a person, although really acting as agent, and known to be such, may nevertheless bind himself by the mode of signing the contract.

The books contain many instances of agents who have thus been held liable in consequence of the improper mode of signing the contract, and it must be confessed that in some of these instances the liability was apparently based on grounds more technical than just. The tendency of modern decisions has, however, been to inquire to whom the credit was really given, or who was considered as the real party to the contract, rather than the mere form of it. In other words, although, in order to bind the principal upon a contract made by an agent, the contract must be within the authority committed to the agent, the better opinion, it is said, is that in the case of a simple contract, it is not indispensable, in order to bind the principal, that it should be executed in the name and as the act of the principal. It will be sufficient, if, upon the whole instrument, it can be gathered from the terms thereof that the party describes himself and

[1] Ford v. Williams, 21 How. 287; Rinz v. Norton, 4 Cal. 355; Petrich v. Ford, 21 Md. 489; Elkins v. Boston, etc. R. R. Co. 19 N. H. 337; Van Lien v. Byrnes, 1 Hilton 133; Merrick's estate, 2 Ashm. 485; Woodruff v. McGehee, 30 Georgia, 158; Ames v. St. Paul, etc. R. R. Co. 12 Minn. 413; Tanitor v. Pendergrast, 3 Hill. 72; Erickson v. Compton, 6 How. Prac. 471.

[2] Barker v. Garvey, 83 Ill. 184. But in case of suit against the agent, it is not admissible to show the agency in *discharge* of his liability on the contract, though it is admissible by such proof to *add* the liability of the principal. 2 Sm. L. C., note to Thomson v. Davenport.

acts as agent, and intended thereby to bind the principal, and not himself.[1]

It would, however, be unsafe to place much dependence on this disposition on the part of the courts; and it will be found much easier to prevent such questions arising than to meet them after they have arisen.

Next, let us see how the agent should execute the contract, so as to bind his principal, and at the same time avoid incurring any personal liability.

When one has authority from another to execute a deed, or other instrument under seal, he should do it in the name of that other, and not in his own name, even as agent.[2] This should be done not merely by signing the name of the principal, as if it was his own act, but by adding some words indicating that the signature was signed by the agent, and not by the principal.[3] And the same rules apply to contracts or other instruments not under seal. If, however, the principal's name is signed by the agent at the request of the principal, and in his presence, the signature is deemed that of the principal himself, since the agent does not act in that capacity, but merely as the hand or amanuensis of the principal; and in such case the agent should sign the principal's name only, as if the principal had himself signed it.[4] Only the name of the principal should be used in the body of the instrument as one of the contracting parties; the agent should then sign his principal's name to it, and

[1] Smith v. Alexander, 31 Mo. 193; Ins. Co. v. Smith, 3 Wharton, 521.

[2] Robbins v. Butler, 24 Ill. 428.

[3] Story on Ag. sec. 147 *et post.*

[4] Ibid. sec. 51; Gardner v. Gardner, 5 Cush. 483; R. I. & St. L. R. R. Co. v. Schamick, 65 Ill. 223; Meyer v. King, 22 La. Ann. 567.

then his own as agent.[1] A deed which ran, "Know all men by these presents, that I, A B, as agent for C D, do hereby grant, sell and convey," etc., and signed "A B for C D," was held to be the deed of "A B," and not of "C D."[2] The objection here is to the fact that "A B," the agent, makes himself the grantor in the body of the instrument, and not so much to the mode of signature, since it makes no material difference as to the order in which the names there stand, so long as it clearly appears that the agent really signed for the principal, though it would have been more regular to have signed "C D, by his attorney, A B," or "C D, by A B, his attorney."[3]

So, where an agent executed a deed in his own name, although he covenanted "for and on behalf" of his principal, he was held personally bound, and not his principal.[4] So, where, in the body of the lease, the parties of the first part were described as "The New England Planing Mill Company," but the lease was executed by a firm (who were in fact the Planing Mill Company) in their firm name, it was held, that the lease was to be regarded as the contract of the parties who had executed it in the firm name, and not that of the company.[5] A check signed "A B, agent," but disclosing no principal, was held the personal check of "A B."[6] Where parties executed a bond in their individual names,

[1] Mears' Ex'r v. Morrison, Breese, 223; Bingham v. Stewart, 13 Minn. 106; Smith v. Morse, 9 Wall. 76.

[2] Frontine v. Small, 2 Ld. Raym. 1418; Stone v. Wood, 7 Cow. 453.

[3] Story on Ag. sec. 154; King v. Handy, 2 Bradw. 212; Wilks v. Back, 2 East. R. 142.

[4] Appleton v. Binks, 5 East. R. 148.

[5] Kautsky v. Atwood, 79 Ill. 204.

[6] Bickfort v. First N. Bank of Ch. 42 Ill. 239.

describing themselves as trustees of a corporation named, but sealing with their own seals, they were held personally liable.[1] So, where a contract for the sale of lands stated in the body of it that it was made by the parties of the first part (naming them), by B, their attorney, the concluding cause was, "In witness whereof the said B, as attorney for the parties of the first part, and the said parties of the second part, have hereunto set their hands and seals," and B signed his own name only, with a single seal, it was held that the parties of the first part were not bound, and that the instrument should have been executed in the name of the principals, and purport to be sealed with their seals, instead of the seal of the attorney.[2] So, where a person, in a contract for the exchange of lands, styled himself "agent for others," but without stipulating in their name, or undertaking to bind them as their agent, it was held that he was named as agent by way of recital only, and that he was personally liable on the contract, and entitled to its benefit.[3]

There are cases where equity would interfere to aid a defective execution.[4] So, there are instances in which courts do not require the same strictness in the mode of execution, but these exceptions arise mostly in cases of commercial contracts, and contracts not under seal, and it would serve no practical purpose to follow them out in a work of this character.

[1] Taft v. Brewster, 4 Johns. 334.

[2] Townsend v. Hubbard, 4 Hill, 351; Townsend v. Corning, 23 Wend. 435.

[3] Couch v. Ingersoll, 2 Pick. 292. See, also, Sayre v. Nichols, 5 Cal. 487; Andrews v. Allen, 4 Han. (Del.) 452; Seaver v. Coburn, 10 Cush. 324; Chouteau v. Paul, 3 Mo. 260; Stackpole v. Arnold, 11 Mass. 27; Collins v. Buckeye Ins. Co. 17 Ohio St. 215; Bingham v. Stewart, 13 Minn. 106.

[4] Doan v. Duncan, 17 Ill. 274.

A few suggestions as to the manner of executing instruments with respect to the formalities to be observed by principals themselves, may not be out of place.

For instance, whether a writing is under seal or not, is a question to be determined by the fact whether the party affixed a seal, and not by his assertion in the body of the instrument, or the attestation;[1] therefore the recital, "the parties hereunto set their hands and seals," is insufficient without an actual sealing.[2] On the other hand, such actual sealing is sufficient without this recital.[3]

Two or more signers of a deed *may* adopt one seal, and such adoption may be inferred from the facts that the deed contains the allegation, "sealed with our seals," and that one of the makers signs and delivers it as his deed, without adding a new seal, after signing and sealing by the others.[4] So, a quit-claim deed from two grantors, signed and sealed by each of them, and signed by their wives with one seal against both signatures, and concluding, after the clause of release of dower, "In witness whereof, we, the grantors, have hereunto set our hands and seals," was held to be sealed by both the wives.[5] So, where an instrument between two parties concluded, "Given under our hands and seals," and the name of the first signer alone had a seal after it, the other signing immediately below, it was held to be a sealed instrument as to both.[6] Where there are several

[1] 2 Hilliard on Real Prop. 296.

[2] Chilton v. The People, 66 Ill. 501.

[3] Hilliard on Real Prop. 295. See, however, as Virginia, Missouri, Texas and Alabama, Ibid.

[4] 2 Hilliard on Real Prop. 295.

[5] Tasker v. Bartlett, 5 Cush. 359.

[6] Hilliard on Real Prop. 295.

signers, and only one seal or scrawl, whether all intended to adopt it, is a question for the jury; but the presumption of law is that an instrument signed by two, but with only one seal, is sealed by both; that is, that each had adopted the seal as his own, and the party contesting that it is so should aver by plea that it is not a sealed instrument as to him.[1] And in any event it is the instrument of the party sealing it,[2] because the same contract may be the specialty (or deed) of one party, and the parol agreement (or simple contract) of the other.[3]

By seal is meant, at common law, an impression upon wax or wafer, or some other tenacious substance, and such a seal is still required in New York, and some of the other States; but in Illinois, Pennsylvania, Ohio, Missouri, Virginia, Maryland, New Jersey, Delaware, Indiana, Tennessee, Alabama, Michigan, Kentucky and Florida, a written or ink seal or scrawl is allowed instead of a seal.[4] In Illinois, brackets were held to be a seal,[5] and so have the letters "L. S,"[6] and that a party may sign against a scrawl previously printed.[7]

Where the common law seal is still required (except in cases of public officers or courts), an impression made directly on the paper, without the intervention of wax or other tenacious substance, is not a lawful seal.

We have seen that although the agent may have bound

[1] Lambden v. Sharp, 9 Humph. 224; Davis v. Burton, 3 Scam. 41; McLean v. Wilson, Ibid. 50.

[2] Eames v. Preston, 20 Ill. 389.

[3] Stabler v. Coroman, 7 Gill & J. 284.

[4] 2 Hilliard on Real Prop. 295.

[5] Eames v. Preston (*supra*).

[6] Aukary v. McMahon, 3 Scam. 12.

[7] Ibid.

himself personally, the principal may also be bound as a party to the contract, on proof that the agent, although contracting personally, was in fact only the agent of the principal in the matter; since the agent, in such case, has only added his own personal responsibility to that of the principal for whom he acted.[1] But this doctrine is confined to cases of simple contracts, and the same result does not follow as to the principal, at least at law, where the agent has executed a deed or other specialty, so as to bind himself personally,[2] for reasons peculiar to sealed instruments, which it is not necessary here to explain. Where, however, the instrument was *unnecessarily* under seal,[3] as a contract for the sale of lands,[4] it will be governed by the rule applicable to simple contracts. If an instrument executed by an agent be one which, without seal, would bind the principal, it will bind him if under seal,[5] at least in equity;[6] so that if the agent is only authorized to execute a simple contract, and he *unnecessarily* seals the instrument, it will be good as a simple contract.[7]

[1] Hopkins v. Lancaster, 4 Miller La. Ann. 64; Bude v. Roberts, 12 Wend. 413; Story on Agency, sec. 160–270.

[2] Appleton v. Binks, 5 East. R. 148; Robbins v. Butler, 24 Ill. 428. As to effect in equity, see Doan v. Duncan, 17 Ill. 274.

[3] Story on Agency, sec. 49.

[4] Dodge v. Hopkins, 14 Wis. 630; Minor v. Willoughby, 3 Minn. 225; Doughaday v. Crowell, 11 N. J. Eq. 201; Ledbetter v. Walker, 31 Alab. 175; Johnson v. McGruder, 15 Mo. 365; Long v. Hertwell, 34 N. J. L. 116.

[5] Wood v. Auburn, etc. R. R. Co. 9 N. Y. 160.

[6] Watson v. Sherman, 84 Ill. 263.

[7] Dickerman v. Ashton, 21 Minn. 538; Stowell v. Eldred, 39 Wis. 614.

CHAPTER VII.

OF THE COMMISSIONS AND THE DEPOSIT.

We have accompanied the agent through the ordinary course of a transaction, from the time of his employment down to the signing of the contract of purchase and sale, and have briefly alluded to his duties, obligations and responsibilities. Let us now turn our attention to some of his rights and privileges, not the least important of which, in a practical light, is his right to compensation, or commission, as it is commonly termed.

Before doing so, however, let us notice for a moment his rights and duties with respect to the deposit money which usually accompanies the execution of the contract, and which, where acting as the agent of the seller, is generally placed in the hands of the broker. This deposit may be made with the agent as a stakeholder, so to speak, between the parties to the contract, or it may be paid to him as the agent of the seller, on account of the purchase money. In the first case, the money is paid to the agent, not *as agent*, but as a stranger, and he must account for it to the party eventually entitled thereto. But where it is paid to him as the agent of the seller, it is deemed in law a payment to his principal. He is bound to pay it over to his principal, and has ordinarily no right to return it

to the person from whom he received it,[1] and it has been held, that where the agent receipted for the money in the name of his principal, the purchaser must look to the latter to account for it, and cannot recover it from the agent, whether the latter has delivered it to his principal or not.[2] So, where an agent gave a receipt for the deposit money on a sale, in the name of his principal, and the sale falling through on account of a defect in the vendor's title, it was held, that an action would not lie against the agent by the vendee for the money paid.[3] And an agent receiving money for his principal, in pursuance of a valid authority, without fraud, duress or mistake, is not liable to an action in behalf of the person who is ultimately entitled to the money, for neglecting to pay the same upon request, and before it was paid over to the principal.[4] But where the money was paid to the agent on the purchase of land, under circumstances showing bad faith, as where it was the design of the vendor to put off upon the purchaser a very defective title as and for a good one, and the latter is entitled to a return of his money, he will not be remitted to his remedy against the principal, but may sue the agent for the recovery of the money back, although he knew, at the time he paid the money to the agent, that the latter was acting in that capacity; because, if the vendor or his agent had known at the time of the contract that the vendor had no title to his land, it would have been a case

[1] Hancock v. Gomery, 58 Barb. 490.
[2] McCubbin v. Graham, 4 Kans. 397.
[3] Bamford v. Shuttleworth, 11 Ad. & El. 296.
[4] Colvin v. Holbrook, 2 Comst. 126; Costigan v. Newland, 12 Barb. 456.

of palpable fraud, and the purchaser would be entitled to rescind the contract; payment of the money over to the principal without notice of the fraud on part of the agent, or notice not to pay it over, would be a good defense, but the agent should prove such payment over, as the law will not presume it.[1] So, it has been held, that if a party who has paid money to an agent for the use of his principal, becomes entitled to recall it, he may, upon notice to the agent, recall it, provided the agent has not paid it over to his principal, and also provided no change has taken place in the situation of the agent since the payment to him, and before such notice.[2] A party who deals with an agent (acting as such, and within the scope of his authority), has, in general, no right to separate him from his principal, and hold him liable in his personal capacity. The agent owes an account of actions to his principal, and that he may be able to render that account, the law, except under special circumstances, refuses to impose upon him a duty to any third party.[3] It is evident, however, that if the agent receives the money fraudulently, or knows that, although properly received by him, the payment over to the principal would work a fraud on third persons, he cannot expect to shield himself under the doctrine cited, because a legal obligation based on a fraudulent or illegal consideration cannot well be conceived.

It has been intimated, that in cases devoid of fraud, even where the purchaser may be entitled to recover

[1] Shipherd v. Underwood, 55 Ill 475.

[2] Bamford v. Shuttleworth, 11 Ad. & El. 296; Saddle v. Evans, 4 Burr. 1984; 1 Pars. on Cont 79; Story on Ag. sec. 300.

[3] 1 Pars. on Cont. 79.

back the deposit money from the agent, who has not yet paid it over to his principal, yet, if the situation of the agent has been changed since the payment of the money to him, and before notice of its recall, the purchaser cannot recover it back from the agent, but must look to the principal for his remedy. But the mere passing of the money by the agent to the credit of the principal, as for his commission, or on account, would not be sufficient, but there must have been a new credit given to the principal since the payment, or advances made on the strength of it, whereby the agent has incurred some fresh liability, or otherwise given some new consideration on the strength of the money in his hands.[1]

Coming now to the law governing the right of the agent to compensation, we will notice somewhat in detail a few of the cases where this right has come in question, from which it will appear, that the foundation of the claim of the broker to compensation must be a *contract* for its payment, express or implied.[2]

Thus, a man is not entitled to a commission from the owner for informing a broker that certain lots are in the market, for which a purchaser is afterward procured by the broker, through such information.[3] So, where the owners of real estate expressly refuse to employ the plaintiff, a broker, in selling their property, it was held, that the mere fact that the plaintiff, having ascertained the price charged for the property, sent a purchaser, to whom a sale was effected, did not entitle the plaintiff to

[1] Story on Ag. sec. 300.
[2] East v. Cummings, 54 Pa. St. 394.
[3] Hovey v. Townsend, 16 How. Pr. 125.

recover commission.[1] And where a broker, not employed by the owner, offered to sell to one whose attention had been attracted by the owner's advertisement, but the customer said he would see the owner; afterward the broker was employed to sell, but the customer, without again seeing him, bought of the owner, it was held, that the broker had earned no commission.[2] An agreement to sell real estate was made by a broker with an owner; on a day fixed the broker stated that he could do nothing with the property, but subsequently informed another broker that it was for sale, and through the latter a sale was effected. Held, that the employment was at an end when the information of inability to procure a purchaser was given.[3] H, a real estate broker, having heard that K desired to sell certain property, went to his office, and informed him that in case he succeeded in negotiating a sale, he should expect the usual commission. Afterward H brought K and J together, and certain papers were executed, whereby they contracted for the sale of the property, with a stipulation that if either party should fail to comply with the contract, a forfeiture of $1,000 should be paid by the party in default. J failed to comply with the contract, and gave his note for the forfeit money. Held, that H was not entitled to his commission.[4] So, where employed to sell at a fixed price, the broker was held not entitled to commission if he obtained an offer at a less price, although the principal sells to a third person at a still less price.[5] But if the

[1] Pierce v. Thomas, 14 E. D. Smith, 354.
[2] Cushman v. Gori, 1 Hilt. 356.
[3] Holly v. Townsend, 2 Hilt. 34.
[4] Kimberly v. Henderson, 29 Md. 512.
[5] Jacobs v. Kolff, 1 Hilt. 133.

principal had sold, even at such lower price, to the customer furnished by the broker, the latter would be entitled to commission.[1] And the principal cannot, after the broker has found a purchaser, dismiss the broker, and close the sale himself. "The principal gets the benefit of the agent's labor," the court says, "and must pay for it."[2] But where a broker, without authority from the owner, offered to a third person property at a particular price, and then informed the owner, who authorized him to sell it at that price, and after this the owner sold it to the person to whom the offer had been made, but at a less price, it was held, that the broker was not entitled to commission, for the reason that he did not effect any sale at the price he was authorized to sell at.[3] So, the mere fact that a broker intervened between the parties to a negotiation, which was originally commenced and finally consummated without his agency, and by his conversation with third persons contributed to its consummation, does not entitle him to commission, where a sale at the price fixed as the condition of his employment was not effected, and he was not prevented by his employer from effecting a sale at that price.[4] Plaintiff (a real estate broker), without any express contract of employment with defendant, introduced to him a person who purchased of him a piece of land. Plaintiff was present during the negotiation between the parties, and spoke disparagingly of the value of the property, and suggested

[1] Rees v. Spruance, 45 Ill. 308.

[2] Gillett v. Corum, 7 Kans. 156, citing Shepherd v. Hedden, 5 Dutch. 234, and Ludlow v. Carmon, 2 Hilt. 107.

[3] Cushman v. Gori, 1 Hilt. 556. See, also, Rees v. Spruance, 45 Ill. 308.

[4] Briggs v. Rowe, 1 Abb. (N. Y.) App. 189.

that the price was too large. He also was present with the parties at the consummation of the contract and the delivery of the deed. The sale was in reality brought about by means of the plaintiff, and but for him the parties would not have come together, but during the whole transaction defendant supposed plaintiff was acting as the agent of the purchaser, and never intended to employ him for himself. In an action to recover commission on the sale, it was held, that no contract of employment was implied from the facts of the case.[1]

In a case of express contract, its terms will govern, and the right of a broker to compensation will depend on whether he has performed the contract on his part, and rendered the services contracted for.

It is a familiar principle of law, to which the case of the real estate agent is not an exception, that the whole service contracted for must be rendered, before the right to compensation can attach. The broker is not entitled to compensation, until he has performed the undertaking assumed by him. Thus, where he undertakes to negotiate a sale, unless performance is prevented by his principal, he has not earned his commission until he has found a purchaser ready and willing to complete the purchase on the terms prescribed by the principal and assented to by the agent.[2] And although the broker's right under a *general employment* would be complete when he has procured a purchaser, able and willing to conclude a bargain on the authorized terms, yet he may, by special agreement with his principal, it is said, so

[1] Atwater v. Lockwood, 39 Conn. 155.

[2] Fraser v. Wyckoff, 63 N. Y. 445. Compare Carman v. Beach, Ibid. 97.

contract, as to make his compensation dependent upon a contingency, which his efforts cannot control, even though it relates to the acts of his principal.[1] Thus, where the compensation of the broker was to be, according to usage, three per cent. upon the purchase money, it was held, that if there was in fact no purchase, there was no right to compensation, although the vendor refused to sell on the terms he first designated.[2] So, where, by special contract, a broker was not to receive any compensation, unless the property was sold at a stated price, he was held to be not entitled to commission, unless the property was sold at that price,[3] or unless he introduces a purchaser who is willing to buy, and the broker was prevented from making the sale by the fraud of the principal.[4] So, in an action on a special contract of the defendant, to pay the plaintiff the usual commission for his services, if he would procure a purchaser for property of the defendant, with a count on an account for "commission for services as broker in getting a customer to purchase" the action cannot, it was held, be maintained without proof of a sale, or of an agreement for the sale, binding on the defendant.[5] So, where there was a written agreement between the owner and a broker, that the former would pay the broker a certain sum to send him a person with whom he might see fit and proper to effect a sale or exchange of his land, it was held, that the broker could not recover upon the agreement without proof of a sale or exchange, nor upon a *quantum meruit* for his services,

[1] Hinds v. Henry, 36 N. J. L. 328.
[2] Power v. Kane, 5 Wis. 265.
[3] Jacobs v. Kolff, 2 Hilt. 133.
[4] Schwartz v. Yearly, 31 Md. 270.
[5] Drury v. Newman, 99 Mass. 256.

without proof that the negotiations were rendered fruitless by the fault of the owner.[1] In another case it was said: "Although, under a general employment to sell real estate, a broker is entitled to be protected against unfairness or fraud, and the owner cannot avail himself of the broker's services in finding a purchaser, and then, by taking the matter into his own hands and reducing the price, effect a sale to the same purchaser, and refuse to pay commission, yet, if the broker accepts an employment that makes his right to commission to depend upon procuring a purchaser on specified terms, he cannot recover if he does not perform that service, unless the employer interfered and prevented performance."[2]

To entitle the broker to compensation from his principal, he must act strictly according to the authority conferred upon him,[3] but the broker would be entitled to the usual commission for a successful negotiation of an *exchange* of property put in his hands for *sale*, if such exchange is accepted by the principal.[4] Where the broker undertakes to furnish a purchaser, he is bound to act in good faith in presenting a person as such, and when he is presented, the employer is not bound to accept him or pay the commission, unless he is ready and able to perform the contract on his part, on the terms proposed;[5] yet, if the owner does accept him, either on the

[1] Walker v. Tirrell, 101 Mass. 257.

[2] Schwartz v. Yearly, 31 Md. 270.

[3] Hoyt v. Shipherd, 70 Ill. 309; Ward v. Lawrence, 79 Ill. 295.

[4] Redfield v. Legg, 38 N. Y. 212.

[5] McNavick v. Woodlief, 20 How. 221; Doty v. Miller, 43 Barb. 529; Chilton v. Butler, 1 E. D. Smith, 150; Morgan v. Mason, 4 do. 636; Glentworth v. Luther, 21 Barb. 145; Middleton v. Finda, 25 Cal. 76; Clapp v. Hughes, 1 Phil. (Pa.) 382; Barnard v. Monet, 34 Barb. 90.

terms proposed or upon modified terms then agreed upon, and a valid contract is entered into between the owner and such person, the commission is earned.[1]

As further illustrative of the doctrine that the broker must have performed the whole contract on his part: where a broker received from a party $1,000, and gave a receipt therefor in the name of his principal, stating that the money was to be applied as part of the purchase money, if the party should finally become the buyer of the land, but if he failed or refused to consummate the purchase within a given time, he giving no obligation of any kind binding him to make the purchase, then the $1,000 deposited was to be forfeited; the trade was never consummated, and it was held, that the broker, at most, was only entitled to commission on the deposit.[2] But even where the terms of sale are fixed by the owner, in accordance with which the broker undertakes to find a purchaser, if, upon the procurement of the broker, a purchaser comes, with whom the owner negotiates, and thereupon voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale as proposed to the broker, so that a sale is consummated, or terms are offered which the proposed buyer is ready and willing to accept, in either such case the broker will be entitled to his commission at the rate specified in his agreement with his principal.[3] Thus, where a broker,

[1] Coleman v. Meade, 13 Bushn. 358.

[2] Peirce v. Powell, 57 Ill. 323; Coleman v. Garrigue, 18 Barb. 60.

[3] Stewart v. Mather, 32 Wis. 344; Carter v. Webster, 79 Ill. 435; Lawrence v. Atwood, 1 Bradw. 217; Knapp v. Wallace, 41 N. Y. 477; Redfield v. Legg, 32 N. Y. 212; Doty v. Morris, 43 Barb. 539; Glentwood v. Luther, 21 Barb. 145; Ludlow v. Carman, 2 Hilt. 107; Corning v. Calvert, Ib. 56; Holly v. Gosling, 3 E. D. Smith, 262.

having contracted with the owner of a farm to sell it on a specified commission, procured a buyer, and brought him to the owner; the buyer objecting to the quantity of land, the owner offered to reserve a portion, and sell him only the remainder, whereupon the parties repaired to the office of the broker, who drew up the papers, and did other things in aid of the vendor, and the sale was consummated, it was held, that the broker was entitled to his commission on the land actually sold.[1] So, a ratification by a principal of a broker's agreement to sell land on different terms from those contained in his instructions, is equivalent to a prior authority, and the principal will be bound for the amount of commission agreed upon.[2]

Where a broker is employed to procure a purchaser for a house, and through his agency a sale is effected, he may recover his commission from the party at whose instance and request the services were rendered, whether such person holds the legal title to the property beneficially or in trust.[3] When it is said that the broker may, by special agreement, so contract as to make his compensation depend upon a contingency, which his efforts cannot control, even though it relates to the acts of his principal, the acts referred to are those which may be rightfully exercised by the principal, as being within the provision of the contract itself, and which entered into the contemplation of the parties.[4] The rule, that the broker must have performed the contract on his part, is

[1] Woods v. Stephen, 46 Mo. 555.

[2] Nesbit v. Helser, 49 Mo. 383.

[3] Jones v. Adler, 34 Md. 440.

[4] Cavender v. Waldingham, 2 Mo. App. 551.

therefore subject to the qualification, that if such performance is prevented by the fault of the principal alone, the broker may recover compensation for the services he has rendered, and this on the familiar axiom of the law, that a man shall not be allowed to take advantage of his own wrong. Where a real estate broker was employed by the owner of certain real estate to find a purchaser, without any special agreement, the broker was held, in Pennsylvania, not entitled to claim commission, although he found a person willing to purchase upon the terms fixed, unless the owner *accepted* the purchaser, and an actual sale was made. The court, in rendering its opinion, said: "The principal is by no means bound to accept as a purchaser every person whom the broker presents. He may, for various reasons, be indisposed to sell to a particular person who chooses to present himself in the character of a purchaser. He has not parted with the control of his property, because he has employed a broker to find a purchaser, or bound himself irrevocably to pay the broker a commission for sale to a purchaser, whom upon inquiry and reflection he refuses to accept. The broker's claim for commission is contingent upon the acceptance by his principal of the offer made, and upon an actual sale effected. He always has a *locus pœnitentiæ*, until he agrees to an actual sale. In the absence of a special agreement to the contrary, the broker employed to find a purchaser is not entitled to claim commission upon a sale which the owner declines to make, and which fails of consummation."[1]

[1] Pratt v. Patterson, 7 Phil. (Pa.) 135. See, also, Coleman v. Garrigue, 18 Barb. 60.

On the other hand, it has been held, that if a broker who has been employed to sell land at an agreed rate of commission, finds a purchaser who is willing to take the land at the price fixed, the owner cannot, by a refusal to sell to such person, or by a sale to another, avoid the contract, and escape the payment of commission,[1] and this would seem to be the better and more equitable doctrine, as between the principal and his agent acting *bona fide*, whatever might be the case as between the principal and the purchaser,—a question not now under consideration. Thus, it has been held that the broker has earned his commission when, after finding a purchaser on the terms directed, the owner changes his mind and refuses to sell,[2] or where there is a failure to complete the sale in consequence of a defect in title, and no fault on part of the broker,[3] provided such defect was unknown to the broker.[4] So, where a broker employed to negotiate a loan on mortgage obtains one ready and willing to make the loan, and it turns out that the title to the real estate to be mortgaged is imperfect or incumbered, in consequence of which the loan is not made, he is entitled to

[1] Phelan v. Gardner, 43 Cal. 306. See, also, Nesbit v. Helser, 49 Mo. 383; Bell v. Kaiser, 50 Mo. 150; Tyler v. Pars, 52 Mo. 249; Brenman v. Perry, 7 Phil. (Pa.)

[2] Koch v. Emmerling, 22 How. 69; Bailey v. Chapman, 41 Mo. 536; De Laplaine v. Turney, 44 Wis. 31; Smith v. Smith, 1 Sweeney, 552; Hague v. O'Connor, Ibid. 472; Prickett v. Badger, 1 J. J. Scott (N. S.) 296; De Bernardy v. Hardy, 8 Exch. 822.

[3] Doty v. Miller, 43 Barb. 529; Knapp v. Wallace, 41 N. Y. 477; Garnhart v. Reutchler, 72 Ill. 535.

[4] Hoyt v. Shipherd, 70 Ill. 309. But in Blankenship v. Ryerson, 50 Ala. 426, a broker was held not entitled to commission "for procuring a purchaser" of a plantation, when the intended purchaser declined to complete the contract, without the fault of the principal, on account of a supposed defective title.

his commission,[1] and so he was held entitled, where, after the loan had been obtained, the borrower changed his mind and refused to accept it.[2] So, as already remarked, the principal cannot, after the broker has found a purchaser, dismiss the broker, and close the sale himself.[3]

Where a person contracts with a broker that he shall have the sole agency, he cannot relieve himself from liability for commission by negotiating a sale, in fraud of the agreement, through the agency of a different broker. Thus, in a New York case, where the defendant declined to pay commission, on the ground that before the plaintiff had made sale, he had himself, through the agency of another broker, already negotiated a sale of the property to a third party, the court said: "The agreement with the broker was for the exclusion of all other agencies, and the court below held, that under such agreement, the procurement of a purchaser in accordance with his undertaking, entitled him to commissions. The authorities clearly establish the proposition, that until the broker has faithfully discharged the obligation assumed in the contract with his principal, he is not entitled to the agreed commission, but it is equally well settled, that when one of the contracting parties either prevents or waives the literal performance of a condition precedent, which the other is ready and offers to fulfill, he cannot avail himself of such non-performance to relieve himself from his own obligation. A broker employed to make a

[1] Holly v. Goslins, 3 E. D. Smith, 262.

[2] Corning v. Calvert, 2 Hilt. 56; Fisher v. Drewett, 39 L. T. R. (N. S.) 253; Budd v. Zoller, 52 Mo. 238. See, however, Van Liter v. Byrnes, 1 Hilt. 133, as to what might have been the effect of usage to the contrary.

[3] Gillett v. Corum, *supra*.

sale, under an agreement for the exclusion of all other agencies, is entitled to his commission when he produces a party ready to make the purchase at a satisfactory price, and the principal cannot relieve himself by a capricious refusal to consummate the sale, or by a voluntary act of his own disabling himself from performance."[1] In another case, where the owner had agreed with a broker that he would pay him a certain amount, if he would find a purchaser within a reasonable time, who would pay a certain price for his real estate, it was held, that if within such time the broker procured such a purchaser, he was entitled to his commission, though the owner had sold the property before the broker found the purchaser.[2] And where a broker has rendered services pursuant to an agreement authorizing him to make a sale, and promising compensation in case a sale is made, he cannot be deprived of his right to such compensation by his employer's revocation of his authority, when a sale is subsequently made, which the broker's services contributed to effect.[3]

Where the principal employed a broker to purchase a lot for him upon certain terms, stipulating that the com-

[1] Moses v. Bierling, 31 N. Y. 462, citing Glentwood v. Luther, 21 Barb. 145; Koch v. Emmerling, 22 How. N. S. 69; Van Lien v. Byrnes, 1 Hilt. 134; Holly v. Gosburgh, 3 E. D. Smith, 262; Young v. Hunter, 2 Seld. 204; Holmes v. Holmes, 5 Seld. 527; Carman v. Putty, 21 N. Y. 549. See, also, Bissell v. Terry, 69 Ill. 184.

[2] Lane v. Albright, 49 Ind. 275.

[3] Stillman v. Mitchell, 2 Robt. (N. Y.) 523. But if the revocation was made in good faith, with no intention of a renewal of the negotiation, the subsequent acceptance of a proposition made to him by the purchaser furnished by the agent during the continuance of the agency, was held not to entitle the broker to commission. Uphoff v. Ulrich, 2 Bradw. (Ill.) 399.

pensation of the broker was to be deducted from the purchase money going to the vendor, and was in no event to be paid by the principal, it was held, that in case the principal violated the contract of purchase by refusing to take the property, he would nevertheless be liable to the broker for his commission.[1] So, where a broker was applied to by B, to sell certain land for him, and gave the broker a written description of the land, and stated the price at $2,050, fifty dollars of which was to be the perquisite of the broker for effecting a sale, C obtained from the broker a copy of the description, called on B, and asked him what he would take for the land. B replied, $2,000, which C gave him, and received a conveyance. It was held, that B was responsible to the broker for the $50 perquisite.[2] But where N agreed to pay R, a real estate broker, $70, if he would find a person with whom he could exchange certain land owned by him for other land, on satisfactory terms; and R found S, who offered to give N for his land certain real estate of his, which he stated to be incumbered to the amount of $3,000, and no more, and a certain sum in money; N accepted the offer, and the parties agreed to meet at R's office at a later hour the same day, and execute deeds, which N requested R to prepare. R prepared the deeds, and S attended at the time agreed, but N did not come, and never consummated the exchange. It appeared, that after the parties separated at the first meeting, N discovered that there was a lien of $300 for unpaid taxes on S's land, but he did not inform S, or give any reason for

[1] Cavender v. Waldingham, 2 Mo. App. 551.

[2] Alexander v. Breddan, 14 B Monr. (Ky.) 154.

abandoning the exchange. S had failed to mention the tax lien by inadvertence, and was able and prepared to pay the taxes and remove it. In a suit brought by R to recover the $70 for his services, it was held, that he could not recover, and that N, on finding that S had misstated the amount of the incumbrance on his property, had a right to drop the negotiation at once, without further communication with him.[1] Where a broker reported an offer to his principal, without naming the person from whom it came, it was held, that he could not recover commission in case of a subsequent sale to the party through another broker, at the same price, unless it appeared that the seller knew this fact, or that notice was given to the principal by the first broker, before the completion of the contract and payment of commission to the second broker.[2] So, where several brokers are avowedly employed, the entire duty of the seller, it is said, is performed by remaining neutral between them, and he has a right to make the sale to a buyer produced by any of them, without being called upon to decide between the several brokers, as to which of them was the procuring cause of the sale.[3] On the other hand, it was held, that it is not necessary that the purchaser be made known to the owner as the broker's customer, if he be so in fact. The owner is entitled to know that the broker has been instrumental in sending the purchaser, but when advised by the latter that he has received information of the purpose to sell and the price, it is the owner's duty

[1] Rockwell v. Newton, 44 Conn. 333.

[2] Vreeland v. Vetterlein, 33 N. J. L. 247.

[3] Tinges v. Moah, 25 Mo. 480.

to inquire whence the information was received,[1] and that when the owner has placed his property in the hands of two or more brokers to sell, notice to one of a change of purpose does not affect another, nor is the latter chargeable with notice because of any act of the owner in improving the property, inconsistent with a design to sell, and his agency is not revoked thereby.[2] An owner employed a broker to sell a house, but afterward himself sold it to A, who had been informed of the house by one to whom the broker had spoken about it, in order to a sale to a friend of such informant, but which sale was never effected. The owner settled with the broker, without telling him the name of the purchaser. In an action by the broker for additional commission, it was held, that the question, whether the owner not mentioning A's name was such a concealment of a material fact as to avoid the settlement, was one for the jury.[3]

The selling of real estate involves the employment of such agencies and instrumentalities on the part of the broker, as to sometimes render it difficult to determine to what extent the sale is to be attributed to his agency. The authorities are agreed that to earn his commission,

[1] Lloyd v. Mathews, 51 N. Y. 124.

[2] Ibid. See, further, as to broker's right to compensation under peculiar circumstances, State v. Chase, 3 Harr & J. (Ind.) 182; Franklin v. Robinson, 1 Johns. Ch. 157; Bradford v. Kimberly, 3 Ibid. 431; Morrison v. Ogdensburgh R. R. Co. 52 Barb. 173; Fuller v. Ellis, 3 Ver. 345; McDonald v. Lord, 26 How. Pr. 404; Simpson v. Lamb, 84 E. C. L. 603; Baxter v. Lamont, 60 Ill. 237; Patten v. Patten, 75 Ill. 446; McGorem v. Wooley, 20 S. C. 22; Clendenan v. Meade, 5 Cent. Law Jour. 409; Beach v. Cresswell, 3 Md. 196; Garnhart v. Rencher, 72 Ill. 535; Evans v. Hughes, 76 Id. 115; McEwen v. Kerfoot, 37 Id. 530.

[3] Newhall v. Pierce, 115 Mass. 457. See, also, Mooney v. Elder, 56 N. Y. 238.

the broker must have been the procuring cause of the sale, but they are not so well agreed as to when he has been such procuring cause. In a New York case it was held, that to entitle a real estate broker to compensation, it is sufficient that a sale is effected through his agency, as its procuring cause, and if his communications with the purchaser are the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned, although the broker does not negotiate and is not present at the sale. That it is not necessary that the purchaser be made known to the owner as the broker's customer, if he be so in fact.[1] And where a broker, under due employment by the owner, procured the sale of property, he was held entitled to his commission on the sale, although the owner may have closed with the purchaser, in ignorance of the fact that the latter had seen the broker, provided he was not misled by any act of the broker; thus, where the purchaser, after being sent by the broker to view the property, did not return to him, but, acting on subsequently acquired information, went directly to the owner, and completed a purchase with him, this did not relieve the owner from his obligation to pay the broker his commission.[2] In another case it was held, that where real estate was sold through the instrumentality of a broker employed by the owner, although the owner himself negotiated the sale, and although the purchaser was not introduced to the owner by the broker, and the latter was not personally acquainted with the purchaser, the broker was entitled

[1] Lloyd v. Mathews, *supra*.

[2] Harford v. Shafer, 4 Daly, 243.

to his commission[1] So, in a Maryland case, it was said: "The broker must be the procuring cause; that is, his services, however slight, must be the efficient cause of the sale. If the mere introduction of the property to the buyer by an advertisement, or any other services, be the immediate and efficient cause of the bargain and sale, the broker earns his commission."[2]

And in Connecticut it was held, that if a broker communicate information regarding property in his hands to one who reports it to a friend, who subsequently purchases it from the owner directly, the broker must be regarded as the procuring cause of the sale, and therefore entitled to his commission, and that although he may have had no personal acquaintance with the purchaser.[3] On the other hand, it was held, in a Tennessee case, that the fact that the purchaser of a farm from the owner first had his attention called thereto by the advertisement of a real estate agent, will not entitle the agent to recover a commission under a contract to sell the property.[4] In an unreported case in New York, a broker who was employed to sell a piece of property put up his board on it, which board was the means of intimating to a third person personally acquainted with the owner, and who knew of his owning the property, the fact that it was for sale; whereupon the third person went direct to the owner and bought the property. The broker was held entitled

[1] Sassdorff v. Schmidt, 55 N. Y. 319. See, also, Dennis v. Charlisk, 13 N. Y. Sup. Ct. 21; Shepherd v. Hedden, 29 N. J. L. 334; Jones v. Adler, 34 Md. 440; Arrington v. Casey, 5 Baxter (Tenn.) 609.

[2] Schwartz v. Yearly, 31 Md. 370. See, also, Bayley v. Chadwick, 39 L. T. R. (N. S.) 429.

[3] Lincoln v. McClatchin, 36 Conn. 136.

[4] Charlton v. Weed, 11 Heisk 19.

to his commission, as the procuring cause of the sale.[1] Unless the broker was in fact the procuring cause of the sale, he cannot recover commission ; and where there is no evidence that he was in fact such procuring cause, it was held to be error to charge the jury, that "if they find that, although the purchaser was introduced by the broker to the owner for a different purpose, which was accomplished, the acquaintance thus brought about between the parties led ultimately, without further intervention by the broker, to the sale of the property in question, the plaintiff is entitled to recover."[2] If the services of the broker do not accomplish the sale, and after the proposed purchaser has declined to buy, other persons induce him to buy, the broker has no claim for commission. Thus, one broker, who is unsuccessful in effecting a sale to a party, does not become entitled to a commission upon the success of another in selling the same property.[3] So, where the broker opens the negotiations, but, failing to bring the customer to the specified terms, abandons them, and the employer subsequently sells to the same person at the price fixed, he is held not to be liable to the broker for his commission.[4] But where A employed B, a broker, to sell certain property, and B communicated to him the name of C, who offered to purchase, but at a price less than that asked, which offer A rejected, but shortly after, through another broker, sold the property for the price originally offered by him, it was held, that B was entitled to his commission.[5] On

[1] *Vide*, also, Carter v. Webster, 79 Ill. 435.
[2] McClave v. Paine, 41 How. Pr. 140.
[3] Earp v. Cumming, 54 Pa. St. 394.
[4] Wylie v. Marine Nat. Bk. 61 N. Y. 415.
[5] Gottschalk v. Jennings, 1 La. Ann. 5.

the other hand, where the owner of a house, having received from his son a telegram, asking his lowest price, which was sent at the instigation of a real estate broker, replied, giving the desired information. No sale was made to the person whom the broker had in view as a purchaser, on account of certain incumbrances on the property. Eight months afterward, the person, through another broker, purchased the house, the incumbrances having been removed. Held, that the broker was not entitled to commission.[1] So, where the defendant employed a broker to sell his country place, and the broker introduced R, who had a mine he proposed to exchange for it, but the proposition was rejected. A year and a half after, R bought the place of defendant, as agent for his wife, and it was held, that the broker could not recover commission.[2] And where plaintiff, a real estate broker, being employed by B, who was desirous of purchasing a residence, to find such a place as he desired, introduced him to defendant, who had a place to sell, and informed defendant that if B purchased the property, defendant would have to pay plaintiff the usual commission. Defendant negotiated with B in regard to the sale of the property, but failed to come to an agreement as to the terms, and then sold the property to his brother, who, eleven days thereafter, sold it to B. In a suit by the plaintiff for his commission, it was held, that in the absence of any evidence to show that the sale by defendant to his brother, and the subsequent conveyance by him to B, was done to defraud plaintiff of his commis-

[1] Chandler v. Sutton, 5 Daly, 112. *Vide*, also, Ward v. Fletcher, 124 Mass. 224; Uphoff v. Ulrich, 2 Bradw. 399.

[2] Harris v. Burtnett, 2 Daly, 189.

sion, he could not recover.[1] A broker employed to sell land on commission, and who was fully apprised of the title, introduced his principal to a customer, who made an oral agreement to buy, but, on examining the title and finding it defective, refused to accept a deed. There was, however, a power to sell the land at public auction, by the execution of which a valid title could be made, and the principal and customer agreed that the former should procure such a sale, and that the latter should bid for and buy the land. A sale was made accordingly, but the land was sold to a third person at a higher price than that agreed upon between the principal and customer. In a suit by the broker for his commission, it was held, that he was not entitled to recover,—1st, because the customer procured by him never entered into any binding contract to purchase; 2nd, he was not entitled to any commission on the auction sale, because his agency in bringing it about was too remote.[2] But where plaintiff was employed by defendant to aid him in finding a house and procuring a purchaser, and defendant acknowledged the value of his services, and promised to pay for them; it did not appear that the purchase was finally consummated through the agency of the plaintiff; but it not appearing, from the terms of the employment, that success was a condition precedent to compensation, the plaintiff was allowed to recover.[3]

It has been held that a broker who is employed to negotiate an exchange of property on fixed terms is not entitled to his commission until he obtains a contract,

[1] Bennett v. Kidder, 5 Daly, 512.

[2] Tombs v. Alexander, 101 Mass. 255.

[3] Goldsmith v. Obernier, 3 E. D. Smith, 121.

which is accepted by, or is available to his employer, although it is sufficient, if the contract is enforceable in equity.[2] But in Barnard v. Monet,[3] the Court says: "The duty of a real estate broker consists in bringing the minds of the vendor and vendee to an agreement at which time he is entitled to his compensation as such broker, whether the contract between the vendor and vendee be reduced to writing or not."[4] And in another New York case it was held, that it was not necessary to entitle the broker to compensation, that the contract should be in writing, but that "He is entitled to his commission as soon as he has found a party willing to purchase on the terms which the vendor is willing to accept, and without regard to the question whether he subsequently refused to complete the bargain." In this case the broker who had been employed by the defendant introduced one S as a purchaser. The parties agreed, and the defendant gave S this receipt:

"Received from M. A. Schwab the sum of ten dollars, part of purchase money on the sale of my house, No. 182 Ludlow Street, in the City of New York, for $22,100."

"CHARLES KORN.
"BARBARA KORN.

"NEW YORK, January 28, 1869."

The receipt was given preliminary to an agreement to be executed by the parties, in which the terms of sale should be more fully stated, and upon the execution of which $500 were to be paid. This agreement was never

[1] Barnes v. Roberts, 5 Bosw. (N. Y.) 173; Colemau v. Meade, 13 Bush. 358.

[2] Haines v. Begner, 9 Phil. (Pa.) 51; Simonson v. Kissick, 4 Daly, 143.

[3] 42 N. Y. 202.

[4] See also, Duffy v. Hobson, 40 Cal. 240; Mooney v. Elder, 56 N. Y. 238; Moses v. Bierling, 31 N. Y. 462; Koch v. Emmerling, 22 How. (U. S.) 99.

consummated. Schwab declined the purchase, and the defendant, having refused to pay plaintiff's claim for commission, suit was brought for its recovery. The Court added: "Defendant was not compelled to give such receipt or accept the money. He could have refused to sell until a more suitable contract had been prepared, and the $500 were paid. He chose to consider the sale as made when the receipt was given, and trusted to the credit and honesty of the purchaser for the payment of the $500 and the execution of another agreement. In this he acted upon his own responsibility, and must suffer the consequence of his omission or neglect. The plaintiff's claim for commission is independent of the execution of any agreement between the defendant and the purchaser, and consequently such claim can not be affected by the validity or invalidity of the agreement within the Statute of Frauds, or whether it could be enforced or not."[1] In any event, where the broker effects a contract of sale mutually binding upon vendor and purchaser, he has earned his commission, notwithstanding the refusal of the purchaser afterward to complete the purchase.[2] And so I apprehend, even though the contract should not be binding on the principal under the Statute of Frauds: as where the broker has signed the contract with the purchaser without the *written* authority required in Illinois and some of the other

[1] Heimrich v. Korn, 4 Daly 74, citing and following Barnard v. Monet (*supra.*) See, also, N. Y. Cent. Ins. Co. v. Nat. Prov. Ins. Co. 14 N. Y. 85; Corning v. Calvert, 2 Hilton, 56; Glentwood v. Luther, 21 Barb. 145; Barnes v. Roberts, 5 Bosw. 73; Holly v. Goslin, 3 E. D. Smith, 262; Lockwood v. Levick, 8 J. Scott (N. S.) 603.

[2] Love v. Miller, 53 Ind. 294; Pearson v. Mason, 120 Mass. 53; Leete v. Norton, 43 Conn. 219.

States. In Bach v. Emerick,[1] it was held, that the right of a broker who had been employed to obtain, and had obtained, a purchaser was held not to be affected by non-performance of the contract, or the fact that, on the purchaser's failure to perform, the broker procured another purchaser, and stated that he expected no commission on the other sale, or that the vendor did not understand the contract as written, provided the broker was not guilty of fault or deception: but that the right of the broker to commission on the first sale would be affected by complicity between him and the person claimed to be procured by him as the purchaser, as by such person being a mere pretended purchaser, who, by arrangement with the broker, had no intention of fulfilling the contract; in such case the broker could not recover.

We have noticed somewhat fully, in another chapter,[2] the doctrine sometimes laid down in general terms that a broker can not render such services for both buyer and seller at the same time as to entitle him to a commission from both, and the reader is referred to what was there said for the limitations and qualifications with which the general proposition should, it is conceived, be received. It has been said, that if the principal rejects the purchaser offered by the broker, and the broker claims his commission, he must show, not only that the person furnished was willing to accept the offer, precisely as made, but, in addition, that he was an eligible purchaser, and such an one as the principal was bound as between himself and the broker to accept.[3] But it has also been held,

[1] 53 N. Y. Sup. Ct. 548.
[2] Chap. II.
[3] Everhart v. Searle, 74 Pa. St. 256.

that in an action by the broker for commission, he has made out a *prima facie* case when he has proved the introduction by him to the defendant of a person willing to purchase on the terms on which he has been authorized by the defendant to sell; and that it is not necessary for him to prove in the first instance that the person introduced was of sufficient pecuniary ability to pay the price; but the burden of proof is on the defendant to prove the contrary; nor is the broker obliged to cause the party willing to purchase to tender the defendant a written agreement to that effect,[1] and this would seem the sounder doctrine.

In a suit for commission, the broker may show that he acted for his principal, notwithstanding he may have transacted the business in his own name, and the purchaser only knew him in the transaction.[2] Where an agent has been employed to sell land, at no fixed rate of compensation, the jury are to fix the value of his services, and in so doing, the amount usually paid professional land brokers for such services may be taken into consideration.[3] Where the broker's contract is to *sell*, his commission is dependent on his making a sale, if he sues on the contract; otherwise, if he sues on a *quantum meruit*.[4] Where a broker employed to purchase a specified property at a fixed price had brought suit against his principal for commission, and the latter refused to accept the deed, the vendor's right to convey, or the actual value

[1] Cook v. Kroencke, 4 Daly (N. Y.) 268; Hart v. Hoffman, 44 How. N. Y. Pr. 168.

[2] Wheelock v. Hicks, 75 Ill. 460.

[3] Ruckman v. Bergholz, 38 N. J. L. 631.

[4] Garnhart v. Reuchler, 72 Ill. 535.

of the property, were held not to be essential matters of inquiry, where the broker had acted in good faith.[1]

An agent, having a power of attorney from his principal to sell land, made a proposition of sale to another in writing, describing himself in the body of the writing as agent, but signed his own name alone, without description, which proposition was accepted, but the principal refused to execute the conveyance, as he had covenanted to do in the power of attorney. In an action against the principal for commission, it was held, that the written proposition of the agent was admissible in evidence.[2]

A broker who engages for a commission to find a purchaser of land at such price as may be agreed upon between such purchaser and the vendor, and then becomes himself the purchaser, in whole or in part, the vendor accepting him as such, may recover the commission, upon clear proof that such was the understanding on the part of the vendor at the time of the sale.[3] But where a broker agreed with the owner to sell certain real estate for him within a certain time, on agreed commission, and before the expiration of the time the owner requested the return of the agreement, whereupon the broker offered to purchase the land himself, rather than lose the sale, it was held, that the offer was not equivalent to a sale, and that the relation of principal and agent between the parties could not be changed into that of vendor and vendee without the consent of the principal.[4] In an action by a broker against F, his employer, to recover

[1] Cavender v. Waddingham, 5 Mo. App. 457. Wheeler v. Knaggs, 3 Ohio 169.

[2] Grant v. Hardy, 33 Wis. 668.

[3] Tower v. O'Neil, 66 Pa. St 332.

for services in negotiating an exchange of real estate, it appeared that after F's written proposition had been accepted by R, to exchange within a stipulated period, by warranty deed free from incumbrance, the broker prepared a deed, conveying F's parcel, subject to certain terms, and kept F in ignorance of R's refusal to accept this deed, until the specified period had elapsed, held, that the broker's negligence precluded his recovery.[1]

The finding of a purchaser for real estate, and the successful conduct of a negotiation to a favorable consummation, is a task involving much tact, patience and perseverance, and often necessitates, or renders convenient at least, the employment of sub-agents, by the broker previously employed by the owner; so that the employment of sub-agents by brokers is of such frequent occurrence as at first blush to apparently justify the statement that it is a usage of the trade among real estate brokers. Although the practice lacks so far the elements of universality and uniformity, that it would perhaps be scarcely safe to assert that the employment of sub-agents was a usage of the trade within the meaning of the law, so far as to warrant the presumption of authority on the part of the agent to make such employment, nevertheless the rights of a sub-agent with respect to his immediate employer—the broker—and also with respect to the real principal, the owner, is a question so frequently arising as to demand notice.

In general it may be said, that if the broker employs a sub-agent to aid in the transaction in the absence of an

[1] Fisher v. Dynes, 62 Ind. 348. [2] Ward v. Fletcher, 124 Mass. 224.

understanding authorizing such employment, the sub-agent must regard the broker as his principal and look to him alone for his compensation.

But it is said, that, where the employment of the sub-agent was pursuant to an agreement between the owner and his broker, the sub-agent may make a direct claim against the owner; and so, where the employment of the sub-agent is with the knowledge and consent of the principal and is recognized by him, it is said, the sub-agent may look to him for compensation. But care must be taken in applying these exceptions. The owner has ordinarily agreed and expected to pay a certain sum or commission to the broker he employs, in case the latter effects a sale of the property. It is immaterial to him, by what legitimate means the broker effects the sale. He may, therefore, very readily be supposed to witness the efforts of the sub-agent in that direction, not only without objection, but with evident complacency. Yet it is not thence to be inferred, that he is thereby bound to affirm or carry out every promise which his broker has without his knowledge made to the sub-agent. If the contract of employment between the owner and the broker provided for the employment of the sub-agent, under circumstances involving either an express or implied agreement on the part of the owner to compensate such sub-agent in addition to the commission to be paid to the broker, or if the broker has, with the knowledge and consent of the owner, and *in his behalf*, promised to pay the sub-agent for his services—in either such case the latter may look to the owner for compensation. But where the compensation promised by the

broker is a share of his commission, it is immaterial, so far as the rights of the sub-agent as against the owner are concerned, whether the latter has knowledge of such arrangement or not, unless, indeed, he becomes so far a party to such agreement as to have become guarantor or surety for the performance of his broker's undertaking, or unless a novation has been effected, whereby privity of contract is created between the owner and sub-agent. But to establish these exceptional conditions, something further than the mere knowledge or assent of the owner above spoken of is necessary, so that the general rule above enunciated may be said to have practically few exceptions.

But this case is often presented. A, the broker of the owner, agrees with B, the broker of a proposed purchaser, to divide with him his (A's) commission, if B will induce his principal to buy the property. B performs his part of the contract and the sale is made, and the question arises as to what are B's rights under the contract between him and A. There is no privity of contract between B and A's principal, but A alone (if any one) is responsible to B on the contract, and the case is virtually one of double employment, so that B's rights will be determined by the principles applicable to such cases; that is to say, B is acting as the agent of both A and the purchaser, and whether the court would aid him in enforcing his contract against A, who, *pro hac vice* is his principal, will depend on whether the purchaser — his other principal — knew of the arrangement with A, and, further, whether B acted merely as a broker or medium of communication in the transaction,

unless it should appear that such arrangement between A and B was contemplated by the purchaser, as, where he has expressly stipulated, that under no circumstances was he to pay any commission on the purchase, but that B must look to the other side for such compensation. In such case it is immaterial whether the purchaser knew of the contract between A and B or not, since B in fact is not undertaking to recover compensation from both sides. And though it might seem that B's undertaking to serve two masters was within the principle and spirit of the doctrine applicable to such cases, it is conceived that in view of such express stipulation and understanding on the part of the purchaser, there can be no such objections founded on the grounds of pablic policy as would present the effect of the well-established custom and usage of the trade in sustaining the contract between the brokers.

CHAPTER VIII.

CONCLUSION.

The purpose of this chapter is to review the route we have passed over, with the view of presenting to the Real Estate Agent, in small compass, a summary of the rights, duties and obligations incidental to his business; and which have been mentioned in detail, leaving to his leisure the examination of the reasons of the conclusions arrived at.

The plan adopted has carried us through: *First.—The Employment of the Agent.* In which was pointed out what constitutes an employment—how it was effected—the difference between an employment to sell and a mere license to sell—the rights of the several brokers where two or more had a concurrent authority—the rights peculiar to a broker who has the exclusive agency—the duty of the broker as to the selection of a purchaser—the relation of trust and confidence which he sustains to his principal, and his duty to observe good faith and candor in all his dealings with, or for the principal, together with some of the disabilities which the law imposes upon the agent in consequence of that relation, both with respect to that which is the subject matter of the agency, as well as with respect to his dealings with third persons.

Second.—Under the head of the authority which the agent possesses as the result of his employment by the

owner to sell property, we considered the different rules which, under various circumstances, should be applied as the measure of his authority. The illustrations of these rules, by adjudicated cases, showed the extent of such authority when it was an express, as distinguished from an implied one, including the powers incidental thereto, such as that of conforming to usage, etc., in its execution; as well as the presumption as to the extent of an implied authority, and the manner in which it was to be exercised.

The agent was cautioned against signing a contract, designed to bind his principal, after authority to do so had been withdrawn, if he would avoid liability to his principal for the consequences of exceeding his authority.

At the same time, the distinction between the effect of the Statute of Frauds, as limiting the authority of the agent, and the effect of the contract of employment, was noted, from which it was shown that his right to compensation would ordinarily not be affected by the refusal of his principal to execute the contract, which was designed to consummate the negotiation effected by the agent pursuant to the contract of employment. The case of an agent exceeding his authority was then considered with the doctrine applicable thereto, whereby it appeared, that if the agent has substantially pursued his authority, the principal would be bound, and that the principal might be bound by the acts authorized, if they were clearly distinguishable from the authorized ones.

As further illustrating this doctrine, if the agent authorized to buy or sell one piece of property should sell two, although the transaction would not bind the princi-

pal as a whole, still, if the entire contract as to the parcel authorized to be bought or sold can be severed from the contract relative to the other parcel, including price, terms, etc., the authorized part of the transaction may be sustained.

The different means by which an agency may be terminated, included the accomplishment of its purpose, whereby the reason for its continuance no longer existed—expiration of the time originally fixed for its duration—renunciation of it by the agent—his death, insanity, etc.—the death of the principal, his insanity, bankruptcy, etc., and his revocation or recall of the authority originally given.

The effect, and mode of ratifying an authorized act by one as agent, needs perhaps no further particularization.

Third.—To the representations made by an agent are seen to be attached important consequences both as to himself and his principal. The term includes more than might at first be supposed, and by it is meant not only assertions, statements and declarations, but acts and conduct, and the impressions and conclusions naturally resulting therefrom.

In enumerating the grounds on which courts lend their aid to undo or reform contracts in furtherance of justice and fair dealing, it formed no part of our purpose to draw a line of distinction between those misrepresentations which, on the one hand, would command the interference of the law, and those which, on the other hand, might be made with legal impunity; but rather to demonstrate the fact that, although confessedly inadequate to the administration of complete justice in every detail of

business transactions, courts of equity exercised a closer and severer scrutiny over the conduct of parties than might be supposed, and condemn many means and instrumentalities which in the excitement of business competition pass unchallenged as legitimate, and justified by the exigencies of the occasion.

Fourth.—The question whether a contract complies with the requirements of that section of the Statute of Frauds (adopted or re-enacted in most of the States) which provides, that "no action shall be brought upon any contract of sale of land, tenements or hereditaments, or any interest in or concerning them, unless the agreement, upon which such action shall be brought or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized," is one of great importance, as well as of frequent recurrence.

A large proportion of sales of land are effected by correspondence between the owner and purchaser, and although the consideration of the question in connection with the latter, forms no part of the present purpose, it is obvious, that what is said in connection with a correspondence or a contract between the owner and a purchaser, equally applies to the correspondence or contract between the owner and his agent employed to sell land, and to questions relating to the extent of the latter's authority or the proper exercise thereof.

Another question of practical importance to the agent is the extent of his personal liability to the purchaser on a contract for the sale of land, signed by the agent in the name of his principal, but without the authority in

writing required by the Statute of Frauds of Illinois and of some other States, from which we deduced the conclusion that in States where, as in Illinois, Massachusetts and Pennsylvania, the remedy against the agent must be by an action on the case for deceit, there would be no such liability on the part of the agent, where he had acted in good faith; but that in those States, where the action could be brought on the ground of an implied warranty of authority by the agent, as in New York, etc., he might be held personally responsible; and the agent was advised of the necessity, or propriety at least, of acquainting the purchaser with the character of the authority he possessed.

Fifth.—The grounds on which an agent is held personally liable to third persons on a contract made in the name of a principal, vary in the different States.

In cases where the agent contracts in the name of a principal in good faith, supposing himself to have the necessary authority, he would not in Illinois, Pennsylvania and Massachusetts be personally liable, but in States where his assuming to have authority is construed as a warranty that he possesses such authority, as in New York, Ohio, California and Minnesota, he may be held liable on the warranty, though not on the contract. The doctrine in these cases applies equally to verbal and written contracts.

If guilty of fraud, misrepresentation, or the like, he would be liable in any event.

So the agent may render himself personally liable by his improper mode of executing the written contract, as appears by the several instances given.

With the view of gaining thereby an artificial credit, brokers sometimes draw and sign the contract as agents, with the view of conveying to the other party the idea that they are representing some unnamed principal, when in fact they have no principal, supposing that if the speculation miscarries, they have escaped any liability on the contract by their mode of signing it. On the other hand, when in fact acting on behalf of a principal, they sometimes incur a personal liability, by virtually, though unintentionally, making the contracts in their own name, as where the broker "contracts and agrees for and on behalf of" his principal, or agrees that his principal shall perform certain acts.

Sixth.—Considerable misapprehension prevails among brokers with respect to their rights and duties regarding the money deposited with them by the purchaser on account of the purchase, which it has been sought to relieve.

The decisions bearing upon the rights of the broker to compensation may seem to be somewhat conflicting. From them we may, however, deduce the following general propositions:

1st. To entitle the broker to compensation there must have been a contract for payment, either express or implied.

A contract for payment for his services at the customary rate in that locality would be implied from his employment by the principal to effect the sale or purchase, as the case may be.

So an implied promise to pay for his services would result from the principal's availing himself of them after

notice of the conditions on which the services were to be rendered.

By express contract is meant a specific agreement between the broker and his principal as to the terms and conditions of the compensation to be paid to the broker.[1]

Where such a contract exists the fact that its terms must determine the rights of the parties, has occasioned most of the apparent conflict between the decisions.

Mention has been made of a general employment of the broker, in contradistinction to a special agreement, as affording a different measure of the broker's right to compensation. The difference referred to is this: Where an owner simply employs and authorizes a broker to sell or procure a purchaser for certain property at a price and on terms named, as is usually the case, this would be a general employment. But if the agreement should be that the broker should not be entitled to his commission until the sale was consummated by the payment of the consideration money; or if the right to compensation was by the agreement made to depend upon any other special contingency, the broker would be held to prove the performance of the condition on which his right to compensation depended. It is true that where the employment is general the broker is equally bound to prove that he has rendered the service contracted for; but this proof would not ordinarily be attended with the same particularity and strictness that would be required

[1] Where there has been a sale of real estate and there is no clear proof of a customary rate of commission and no special agreement has been made with reference thereto, the proper measure of compensation is the value of the services rendered. Potts v. Aechtuemacht, 9 Reporter, 721.

in the case of an express contract in the sense in which we are using the term. From which it will be manifest to the broker that it is to his interest to avoid embodying too many conditions and stipulations in his agreement with his principal.

2nd. Whether the broker has been, in fact, the procuring cause of the sale, is a question which arises oftener than any other. The authorities have gone far to support the claim of the broker when he appears to have been in reality the means of effecting the sale. Thus we have seen that it is not necessary that the purchaser should ever have seen the broker, if the latter was really the means of sending him to the owner, or even that the principal should know that the customer was furnished by the broker, if he was so, in fact. But the prevalent idea that if the owner, after the expiration of the time fixed in which the broker was to find a purchaser, should in good faith chance to sell to some person to whom the broker had tried ineffectually to sell, he must pay a commission to the broker, is erroneous. Otherwise the fact that the broker had once spoken to a person regarding the property would operate to deprive the owner of his right to the world as a market, and the activity and energy of the agent, instead of enuring to the advantage of his principal, might result to his disadvantage. Of course the broker has rights in the premises as well as the owner, and those rights are fully protected. Thus we noticed that the owner could not dismiss the broker in order to make the sale to a customer found by the broker, and thus deprive him of his commission; nor can the owner, by collusion with the purchaser, delay or

postpone the acceptance of an offer until after the expiration of the time limited to the agent in which to sell, so as to avoid his liability for commission. Neither will the principal be permitted by any act of his, in violation of the spirit of his contract with the broker,—such as change of mind, refusal to consummate a sale, or to make or accept the loan, change of terms or conditions, withdrawal of contract—to otherwise defeat the claim of the broker for compensation, where he has effected the sale, purchase or loan pursuant to his original authority, and before notice of such change, refusal or withdrawal. In short, the law requires the same good faith on the part of the principal that it does from the agent, and frowns upon all artifices calculated to acquire undue advantage by either.

3rd. Another idea prevalent among both brokers and owners is, that before the broker is entitled to his commission it is necessary that the transaction should be fully consummated between the owner and the purchaser. Of course the owner and broker may have so agreed—and if so, the broker is bound thereby—but in the absence of such an agreement the rule would be as follows: If the purchaser has accepted the terms offered by the principal the duty of the agent who has undertaken to sell or find a purchaser is not completed until he has effected a contract between the parties binding on the purchaser. This rule is subject to the qualification that if the principal, by his own act, prevents the broker from securing such a contract, the broker is excused from obtaining the same.

The contract need not be signed by the principal, so

far as the broker's right to commission is concerned, since such signature is not necessary to make the contract binding on the other party.

But after obtaining and delivering such contract to his principal, without objection on the part of the latter, his duty and obligation ceases. He is not a guarantor of the purchaser, and with the power vests also in the principal the right of enforcing performance of the contract. This rule has also the qualification that the broker must act in good faith in the presentation of a purchaser and while he is not bound to prove the responsibility of a purchaser, or his ability to perform his financial engagements, neither, on the other hand, would the broker be justified in presenting as a purchaser one whose pecuniary irresponsibility he designedly concealed from his principal. Such knowledge and concealment would be regarded a fraud upon the principal, and defeat the agent's claim to commission.

4th. The practice among owners of leaving land for sale with several different brokers is often the occasion of disputes as to which of the brokers is entitled to the commission, and as to which of them the principal is responsible for the same.

Where the agency is an exclusive one, and a purchaser present himself to the owner to whom a sale is effected, no difficulty can arise, and it is only necessary for the agent to show that he was the procuring cause of the sale, however remote his instrumentality. But where several brokers, having a concurrent authority, have offered the property to one who becomes the purchaser, it would seem difficult to determine to the efforts of which of them the credit of the sale was to be attributed.

Indeed it would often puzzle the purchaser himself to analyze the different motives and representations presented or prompted by the several brokers, and declare which of them determined his acceptance of the offer.

So far as the principal is concerned he expects to pay commission but once, and he cannot be blamed for availing himself of the services of the different brokers, even should it prove in the end that the services of all of them but one were rendered without compensation.

If the brokers see fit to render their services gratuitously it is their own business.

But the question remains as to which broker is entitled to the commission, and this question is one of fact rather than of law. Herein then is the key to the solution of the question of the principal's duty and liability. He pays commission to one at the risk of being called upon to pay it to another, in case that other should establish *the fact* that he was the one entitled to the commission. It is, therefore, held that the entire duty of the principal is performed by remaining neutral between the brokers, without being called upon to decide between them as to which of them is entitled to the commission. The result is, that unless the brokers agree between themselves as to which is the party entitled, the question can only be determined by litigation, and even then a judgment against the owner, in favor of the broker suing, would be no legal bar against the claim of another broker, for the reason that the latter could not have been a party to the record. It would seem, therefore, that the principal can not safely do otherwise than await a settlement between the brokers themselves.

Another complication of more frequent occurrence arises where two brokers, having a like concurrent authority, during the term of their employment, each procures a purchaser for the property. Of course but one of the purchasers can have it, and the broker furnishing such purchaser is entitled to his commission ; but what remuneration is to be made to the other broker, who has likewise found a purchaser? We have seen that the sale by one agent terminates the agency of the other, by removing the subject-matter of the agency; and since the principal himself cannot sell the same property at the same time to two different persons, it follows that his agents cannot ; but it does not therefore necessarily follow that because the principal (whether by himself or by another agent) has incapacitated himself from performing the contract which he has authorized his agent to make for him, that therefore the agent has no claim for his services. This would be in effect to constitute the agent the guarantor of his principal's contract, and that not to the party entitled to complain, but to the very person whose wrong-doing was the occasion of the breach of contract. In other words, it would be allowing the principal to take advantage of his own wrong.

The true rule applicable to such cases requires the owner, on making sale through one agent, to give notice to the other ; and if before such notice was given, and during the term of their employment, such other had also found a purchaser, he should be entitled to the same commission which he would have received had not the previous sale been effected.

This doctrine, it will be noticed too, is limited to cases

where the agent has found a purchaser during the time limited in his contract of employment, and that designedly for the purpose of conforming to the authorities cited. But on principle and from analogy to other agencies, the same reasoning applies to cases of an employment, limited to no definite period, especially since the necessity of notifying the other agents of a sale effected by one of their number imposes no hardship on the owner, while the want of such notice may work great inconvenience to the broker. On the other hand, it may be said that the usages of the trade relieve the owner of the necessity of giving such notice. It is difficult to appreciate the weight of this argument in view of the fact that, generally speaking, the broker is not aware that the owner has employed other agents with concurrent authority; but if there be any argument to be drawn from the reasons referred to, the remedy lies in the hands of the brokers themselves, by refusing to accept other than the exclusive agency

The rights of the several brokers, as between themselves, where one has assisted another in effecting a sale, formed the subject of the concluding portion of the preceding chapter, and requires no further mention.

APPENDIX.

LEADING CASES BEARING UPON THE RIGHTS OF BROKERS TO COMPENSATION.

ABRAHAM R. B. MOSES, Respondent, *v.* MORITZ BIERLING *et al.*, Appellants.

A broker, employed to negotiate a sale, is not entitled to commissions until he has performed the undertaking assumed in the contract with his principal.

When he produces a proper party, ready to make the purchase at a price satisfactory to the principal, he performs his undertaking, and is entitled to his commissions, unless the principal has already parted with the property.

When the principal contracts with the broker for the exclusion of all other agencies, he cannot relieve himself from liability for commissions, by negotiating a sale in fraud of the agreement through the agency of a different broker.

When one of the contracting parties either waives or prevents the literal performance of a condition precedent, which the other is ready and offers to fulfill, he cannot avail himself of such nonperformance to relieve him from his own obligation.

APPEAL from the affirmance, in the New York Common Pleas, of a judgment rendered for the plaintiff on the trial before Judge BRADY and a jury.

The action was to recover commissions earned by the plaintiff, in negotiating a sale of 4,000 Prussian muskets for the defendants.

It was proved that the service was requested by the defendants, and that it was performed with reasonable despatch by the plaintiff.

There was some slight conflict of evidence on the question whether the sale was in accordance with the instructions, and whether the contract provided for the exclusion of all other brokers; but both these issues were settled in favor of the plaintiff by the jury.

The defendants declined to accept the purchaser. and to pay the plaintiff's commissions, on the ground that they had sold the muskets in the meantime to another party, through the agency of a different broker.

The judge charged the jury, in substance, that if the agreement was for the exclusion of all other agencies, the procurement by the plaintiff of a purchaser, in accordance with his undertaking, entitled him to his commissions. The defendants excepted to the charge, and appealed from the judgment, which was sustained at the General Term.

George C. Barret, for the appellants.

Gershom A. Seixas, for the respondent.

PORTER, J. Shortly after the commencement of the present war, the defendants imported four thousand Prussian muskets, for the purpose of selling them at an advance to the government. Before the arrival of the shipment, they employed the plaintiff to negotiate a sale, stipulating that he should receive a commission of two per cent. upon the price as a compensation for his services. They agreed, as the jury find, that the plaintiff should have the sale of the guns, to the exclusion of all other brokers. The market price of muskets of this description was then four dollars and sixty cents in the city of New York. The defendants mentioned five dollars as their asking price, but they imposed no limitation upon the plaintiff as to the amount or terms of sale. On the arrival of the muskets, he promptly negotiated a sale to a government officer at $4.75 per gun, amounting,

on the four thousand pieces, to $600 more than the market value. The defendants made no objections to the price or terms of sale; but declined to deliver the muskets, or to pay the agreed commission, on the sole ground, that through the agency of another broker they had already negotiated a sale to a third party.

The only question of law in the case, entitled to serious consideration, is, whether the plaintiff was entitled to his agreed commission, on a sale negotiated by the authority of the defendants, but which they declined to ratify; and which failed of consummation for the sole cause that they had already sold the property to a third party, through the agency of another broker, in fraud of their agreement with the plaintiff.

The authorities on which the appellants rely, and others not cited on the argument, clearly establish the proposition, that until the broker has faithfully discharged the obligation assumed in the contract with his principal, he is not entitled to the agreed commission. (Jacobs v. Kolff, 2 Hilt. 143; Corning v. Calvert, 2 id. 56; Barnard v. Monnot, 34 Barb. 90; Barnes v. Roberts, 5 Bosw. 73; McGavock v. Woodlief, 20 How. U. S. 221; Broad v. Thomas, 7 Bing. 99; Read v. Rann, 10 Barn. & Cress. 438.)

But it is equally well settled, that when one of the contracting parties either prevents or waives the literal performance of a condition precedent, which the other is ready and offers to fulfill, he cannot avail himself of such non-performance to relieve him from his own obligation. (Young v. Hunter, 2 Seld. 204; Holmes v. Holmes, 5 id. 527; Carman v. Pultz, 21 N. P. 549.)

A broker employed to make a sale, under an agreement for the exclusion of all other agencies, is entitled to his commissions when he produces a party ready to make the purchase at a satisfactory price; and the principal cannot relieve himself from liability by a capricious refusal to consummate the sale, or by a voluntary act of

his own, disabling him from performance. (Wentworth v. Luther, 21 Barb. 145; Koch v. Emmerling, 22 How. U. S. 69; Van Lien v. Burns, 1 Hilt. 134; Holly v. Gosling, 3 E. D. Smith, 262.)

Judgment affirmed.

JAMES MOONEY, Respondent, *v.* STEWART ELDER, Appellant.

Defendant employed plaintiff, a real estate broker, to sell his house. It was agreed that if a sale was effected through the agency of plaintiff or of any other person, plaintiff was to receive a stipulated commission. Plaintiff advertised the property and made efforts to sell to different parties, among others to a church society. A parol contract for the sale was made between defendant and the society, and the former told plaintiff he had sold the house to the church. Upon presentation of the account defendant refused to pay, claiming he had withdrawn the property from market. At the time of the commencement of this action, to recover the commission, no contract in writing had been made and no part of the purchase-money had been paid. The sale was thereafter consummated and the property was conveyed to the society. *Held*, that plaintiff was entitled to his commission upon the production of a purchaser, ready and willing to purchase upon the defendant's terms, although defendant was unable or refused to consummate the contract; that the parol contract showed, *prima facie*, that such a purchaser had been produced; that defendant, having based his refusal to pay, not upon the ground of the invalidity of the parol contract, but upon that of the withdrawal of the property, could not shield himself from liability upon the former ground, and that a refusal to nonsuit was therefore no error.

Bull v. Price (20 Eng. C. L., 115) distinguished.

(Argued March 23, 1874; decided March 31, 1874.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, affirming a judgment in favor of plaintiff, entered on a verdict.

This action was brought by plaintiff, a real estate broker, to recover commissions alleged to be due under

a contract with defendant for procuring a purchaser for certain premises owned by defendant, situate in the city of Buffalo.

The facts sufficiently appear in the opinion.

Mark B. Moore for the appellant. The contract of sale being a parol contract was void, and plaintiff could not, when this action was commenced, claim commissions. (2 R. S., chap. 7, tit. 1, § 8; Burlingame v. Burlingame, 7 Cow., 92; King v. Brown, 2 Hill, 485; Thayer v. Rock, 13 Wend., 53; Crawford v. Morrell, 8 J. R., 253; Hyslop v. Clarke, 14 id., 458; Van Alstine v. Wemple, 5 Cow., 162; Mackie v. Cairns, id., 580; Bouv. Inst., No. 1321; 3 Comy. Dig., 144.) Plaintiff could not recover his commissions until the sale had been effected or secured to defendant. (Baldwin v. McMahan, 10 Paige, 386; Champlin v. Parish, 11 id., 405; Worrall v. Munn, 1 Seld., 229; Redfield v. Tegg, 38 N. Y., 212; 1 Sugd. V. & P., 54; Bull v. Price, 7 Bing., 237; Story on Con. §§ 329, 331, 973.) The action having been prematurely brought could not be maintained by a right subsequently accruing. (Lowry v. Lawrence, 1 Caine, 69, 71; Boyce v. Morgan, 3 id., 133; Hogan v. Cuyler, 8 Cow., 205; Hare v. Van Dusen, 32 Barb., 92; Smith v. Aylesworth, 40 id., 104; Oothout v. Ballard, 41 id., 33, and cases cited; Osborn v. Moncure, 3 Wend., 170; 1 Chit. Pldgs., 443.)

Delavan F. Clark for the respondent. Plaintiff's right of action depended upon his finding a party ready and willing to purchase upon defendant's terms. (Barnard v. Monnot, 3 Keyes, 203; Moses v. Bierling, 31 N. Y., 462; Stillman v. Mitchell, 2 Robt., 523, affirmed in Ct. of Appeals; Duffy v. Hobson, 40 Cal., 240.) Plaintiff having been induced to commence this action by defendant's statement, that "he had sold his house to the First Church," he was estopped from denying the same.

(Presbyterian Cong. of Salem v. Williams, 9 Wend., 147; Abel v. Van Gelder, 36 N. Y., 513; Finnegan v. Carraher, 47 id., 493; Wolf v. G. F. Ins. Co., 41 id., 620; 30 id., 230.)

GROVER J. When the plaintiff closed his case, the counsel for the defendant moved for a nonsuit, upon the ground that the plaintiff would not be entitled to recover commission unless there had been a contract of sale executed, or some note or memorandum thereof in writing before the action was commenced, and that there was no evidence that a sale had been effected, or that there was any note or memorandum in writing of any contract of sale. This motion was properly denied. Testimony had been given by the plaintiff tending to show that in April, 1872, the defendant had employed the plaintiff, a real estate broker in Buffalo, to effect the sale of his house, situated in the city, for the price of $20,000. That the parties entered into the agreement to the effect that if a sale was effected, either through the agency of the plaintiff or that of any other person, that the defendant should pay the plaintiff a commission of two and one-half per cent. That the plaintiff advertised the property for sale and made various efforts to make one to different parties, among others, to the First Presbyterian Church of Buffalo, which was desirous of purchasing a parsonage. That about the middle of July, the defendant told the plaintiff he had sold the house to the church. Some time thereafter, the plaintiff presented to the defendant his account for his commission, which the defendant refused to pay, upon the ground, as he claimed, that he had withdrawn the property from market before he sold the same. The counsel for the appellant is right in the position that to entitle the plaintiff to recover he must show that his demand was due at the time of the commencement of the action. To entitle the plaintiff to his commission under the contract, it must appear either that the property had been actually sold, either through the agency of the plain-

tiff or of some other, or that from like agency a purchaser had been found ready and willing to take the property upon the terms fixed by the defendant. (Moses v. Bierling, 31 N. Y., 462; Barnard v. Monnot, 3 Keyes, 203; Stillman v. Mitchell, 2 Robertson, 523.) The testimony given was sufficient to prove an actual sale. No objection was made as to the competency of the evidence to establish this fact.

Upon the part of defendant, it was proved that the action was commenced on the twenty eighth day of August, and that the property was not conveyed by him until the eleventh of September thereafter, and that no part of the purchase-money was paid until that time, and that there had been no previous contract for the sale made as required by the statute of frauds, so as to be obligatory upon the parties. Having given this evidence, the defendant renewed his motion for a nonsuit upon substantially the same grounds; which was denied, to which the defendant excepted. The exceptions to the refusals to nonsuit are all that appear in the case. It follows, that if upon a proper submission of the case, the plaintiff was entitled to recover upon any view of the testimony which the jury was authorized to take; the nonsuit was properly denied, and the judgment should be affirmed. We have seen that the plaintiff was entitled to his commission upon the production of a purchaser ready and willing to purchase the property upon the terms fixed by the defendant. The case shows that a parol contract for the sale was made before the middle of July, upon those terms. This shows, *prima facie*, that a purchaser had been produced ready to purchase the property. It was after and in reference to this parol contract doubtless, that the defendant told the plaintiff that he had sold the property. Had the defendant, after this, been unable to consummate the contract or refused so to do, the plaintiff would have been entitled to his commission, having fully performed the contract on his part. The delay of nearly

two months in completing the contract was wholly unexplained. The plaintiff was entitled to his commission upon the production of a purchaser ready and willing to purchase the property, although through the default of the defendant a sale was never effected. There was nothing showing but that the contract might have been at once consummated, had the plaintiff been ready to give a deed and put the purchaser in possession. The defendant having declared to the plaintiff that he had sold the property, and when called on to pay the commission based his refusal to pay, not upon the ground that a valid contract for the sale had not and could not be made, but upon the ground that he had withdrawn the property from market before the sale was made, cannot now shield himself from liability on the former ground. Besides, the evidence shows, *prima facie*, that the purchaser was ready and willing to purchase when the verbal contract was made, and there is nothing appearing subsequently in conflict therewith. The court would have been warranted in holding that the commissions then became due, although the conveyance was not made until some time afterward. In Bull v. Price (20 Eng. Com. Law, 115), it was held, that the true construction of the contract was, that the commission should be paid out of the purchase-money received by the defendant, and did not, therefore, become due until the actual receipt of the money or until the defendant was in fault in not having received it. Such is not the contract in the present case. The commission was not payable out of the purchase-money and became due when the plaintiff had fully and successfully performed the stipulated service.

The judgment appealed from must be affirmed with costs.

All concur.

Judgment affirmed.

JAMES O. LLOYD *et al.*, Respondents, *v.* EDWARD MATTHEWS, Appellant.

To entitle a real estate broker to compensation, it is sufficient that a sale is effected through his agency as its procuring cause; and if his communications with the purchaser are the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned, although the broker does not negotiate and is not present at the sale.

It is not necessary that the purchaser be made known to the owner as the broker's customer, if he is so in fact. The owner is entitled to know that the broker has been instrumental in sending the purchaser: but when advised by the latter that he has received information of the purpose to sell and the price, it is the owner's duty to inquire whence the information was derived.

Where the owner has placed his property in the hands of two or more brokers to sell, notice to one of a change of purpose does not affect another, nor is the latter chargeable with notice because of the acts of the owner in improving the property inconsistent with a design to sell, and his agency is not revoked thereby.

(Argued May 11, 1872; decided September term, 1872.)

APPEAL from judgment of the General Term of the Court of Common Pleas of New York, affirming a judgment in favor of the plaintiffs entered upon a verdict.

The action was brought by the plaintiffs for the recovery of commissions on a sale of certain real estate in the city of New York, made by the defendant, through their agency as brokers in his employment.

After the evidence was closed a motion to dismiss the complaint was made and denied, and a verdict was then rendered for the plaintiffs.

The facts, so far as they are material, are sufficiently stated in the opinion.

Addison R. Brown, for the appellant. To entitle a broker to commissions for effecting a sale, his agency must be the direct and immediate procuring cause thereof.

(Higgins v. Moore, 34 N. Y. 424; Moses v. Bierling, 31 id. 464; Barnard v. Mound, 3 Keyes, 204; Glentworth v. Luther, 21 Barb. 147; Trundy v. Hartford, etc. 6 Robt. 313; Lyon v. Mitchell, 36 N. Y. 237.) The evidence shows that plaintiffs had no agency or connection with the sale. (Dreyer v. Rauch, 3 Daly, 439.) A revocation of the plaintiffs' agency may be implied from the circumstances. (Story's Agency, Sec. 474; Story's Bail., Secs. 207, 208; Story's Cont., Sec. 193; Smith's Mer. Law, 131, 132; Tuttle v. Jackson, 6 Wend. 213, 226; Grinestone v. Carter, 3 Paige, 421; De Ruyter v. St. Peter, etc. 2 Barb. Ch. 555; 4 Kent, 179 [7th ed.]; Baker v. Bliss, 12 N. Y. 74; Myer v. Hinman, 3 Ker. 184, 188.)

Luther R. Marsh for the respondents. Plaintiffs were entitled to commissions if the sale was effected through their agency as its procuring cause. (Knapp v. Wallace, 41 N. Y. 477; Redfield v. Legg, 38 id. 212; Moses v. Bierling, 31 id. 462; Lyon v. Mitchell, 2 Trans. Ap. 47; Barnard v. Monnot, 3 Keyes, 203; Doty v. Morris, 43 Barb. 529; Glentworth v. Luther, 21 id. 145; Ludlow v. Carman, 2 Hilt. 107; Corning v. Calvert, id. 56; Holly v. Gosling, 3 E. D. Smith, 262; Goldsmith v. Obermeier, id. 121; Chilton v. Butler, 1 id. 150.)

LOTT, Ch. C. There was sufficient evidence given on the trial to warrant the jury in finding that the plaintiffs were employed by the defendant to make a sale of the property in question. William T. Lloyd, one of the plaintiffs, testified that the defendant, about the 10th day of March, 1861, called on them in relation to a piece of property which the plaintiffs were offering for sale, and after some conversation had passed in reference to it, he "stated that he had a piece of property which he would like to have" the plaintiffs "sell." He then gave the

location and price thereof, and on being asked whether the price named, $120,000, "was the lowest he would sell it at," he answered that "he thought it was worth about that amount, but was open to an offer," and after being told by the witness that he believed that he had a party that would like a piece of property of about that size, "he said that he would like to have" the witness "sell it for him." This witness also stated that he made a memorandum of the fact of the premises being left for sale, in the presence of the defendant, who gave it to one of the young men in the office of the plaintiffs to enter on their book of property for sale. That evidence is confirmed by the testimony of the defendant himself. He, in answer to the question whether he "had employed the plaintiffs as brokers, for the sale of this property," said, "I never did employ them; I may have stated to them, early in March, that I would sell the property for $120,000, but I did not consider them authorized to sell the property, even at that price, on that day, without consulting me and agreeing on all the terms beforehand." He also, afterward, said that he told the plaintiffs what the size of the lot was, and the price he asked. He further testified that he was only once at the office of the plaintiffs, and he and the plaintiff Lloyd, whose testimony is above given, evidently referred to one and the same interview. The defendant, it will be observed, does not *deny* the statement of Lloyd, but impliedly admits it, and then construes it as not amounting to an *employment* of the plaintiffs to sell the property; what he himself does say is, however, sufficient to warrant the conclusion that he authorized them to find a purchaser and report to him for the purpose of consulting in reference to and agreeing on the terms of sale

There was also testimony tending to show, and sufficient to justify the jury in finding, that the sale of the property was effected through the agency or instrumentality of the plaintiffs. Mr. Lloyd testified, in addition

to his evidence above referred to, that he, a few days after his conversation with the defendant, sent the full particulars of the property, as given by the defendant, to James M. Austin, the grand secretary of the masonic fraternity, and one of the trustees of the masonic hall and asylum fund of the masons of the State of New York, who was desirous of purchasing a site for the erection of a masonic hall, and that he afterward had two interviews with Mr. Austin in relation to its purchase, but that no sale was agreed on. The last of those interviews was in April. He also stated that he was himself a member of the fraternity, and that he had talked with a number of the members thereof advocating the purchase of that property. About a month after the interview in April, Mr. Austin passed the premises, and seeing that workmen were employed in taking down the building, he asked a Mr. Smith (apparently having charge of the work), who was the owner of the property, and on being informed that the defendant was, he went to his place of business; and on his cross-examination by the defendant's counsel, he gives a statement of what then and there occurred between himself and the defendant in relation to the sale of the property, in the following terms: "I asked him if it was still for sale, and he said it was; I asked him if he wanted to sell it for the price that had been named to me; he wanted to know what that price was; I said $120,000, and he said he would; I asked to have the refusal of it for two or three days, until I could communicate with my associates." He added, that a contract of sale was within five days thereafter entered into between the defendant and the fraternity for the sale of the premises to them, Mr. Austin and Robert D. Holmes acting on their behalf. Mr. Austin had previously testified, on his direct examination, that the first knowledge he had of the fact that the property was in the market for sale, was derived from a communication sent to him by Mr. Lloyd, and that he

went "to look at it with a view to purchasing it, in consequence of its being brought to" his "information by Mr. Lloyd." He also stated, on his cross-examination, that he made up his mind six weeks before its purchase, to buy it if he could, and that when he saw the men at work on the building, and as he supposed, tearing it down, he "felt very anxious," and after ascertaining, on inquiry from Mr. Smith, that the defendant was the owner, he went down to see him, and that the negotiation between them above detailed then took place. Testimony was given by both parties tending to show what compensation was proper in case of a recovery.

The defendant proved that he placed the property in the hands of Homer Morgan and E. H. Ludlow & Co., for sale, or at least to receive offers therefor, and that he, in the latter part of April preceding the sale, notified them that it was withdrawn from sale and that he intended to build. He also testified that he, up to the time of the execution of the contract of sale, had no knowledge, information or notice whatever, directly or indirectly, from the plaintiffs or any of them, or otherwise, that they had anything to do with the sale, or with Mr. Austin in reference to the property. He, however, in speaking of what took place between himself and Mr. Austin in reference to the negotiation for the sale of the property and other matters, made the following statement: "After a good deal of conversation, he asked me, if I remember correctly, if I had not offered it for $120,000; I told him I had some time before, but not recently; that I had withdrawn it from sale since April." There was no evidence that it had been offered for that price by either Morgan or E. H. Ludlow & Co., and the above statement tended to show that Austin had previously had communication with some other party, from whom he had received information, not only that the premises were for sale, but also that the defendant, before making the sale, had notice of that fact.

He himself subsequently, after saying that he had never employed the plaintiffs, made the further statement, to which I have already referred in considering the question of the plaintiffs' employment, that he may have stated to them, early in March, that he would sell the property for $120,000; but that he did not consider them authorized to sell it at that price without consulting him, and agreeing on all the terms beforehand. Some other proof, bearing on the question of the plaintiffs' employment and their agency in causing or procuring the sale to be made, was also given; but I do not deem it necessary to set it forth specially. The evidence which has been set forth and referred to was sufficient to call for and require the submission to the jury of the questions of the plaintiffs' employment by the defendant, and his liability for the services rendered by him, under proper instructions as to the rule and principles of law applicable to the case. The motion to dismiss the complaint on the ground stated in the case, that the plaintiffs were not entitled to recover upon the evidence, was, therefore, properly denied. No other ground for the motion is mentioned.

After its denial the defendant's counsel "requested the court to charge the following propositions to the jury:"

1st. That if the conversation detailed by the plaintiff himself occurred just as he has stated it, between him and Mr. Matthews, still, that on this evidence as it now stands, plaintiffs are not entitled to recover.

2d. That if Mr. Matthews, though he may have employed Mr. Lloyd at first to sell the property, subsequently withdrew the property from the market, changing his purpose, and making that change manifest, and giving the brokers, Mr. Morgan and Mr. Ludlow, notice of that change of purpose, the only ones whom he supposed were authorized to sell the property, that then the plaintiff is not entitled to a verdict.

3d. That if Mr. Austin employed Mr. Lloyd to seek for a piece of property for this company for whom he acted, and Mr. Lloyd obtained this property in question for Mr. Austin, that then Mr. Lloyd is not entitled to recover broker's fees from Mr. Matthews.

4th. That a broker is not entitled to a commission in this case merely for giving information to the person who subsequently buys, and for recommending the purchase, unless the broker goes further, and either directly negotiates the sale or directly brings together the buyer and seller, who thereupon complete the bargain.

5th. That a broker's duties are not performed so as to entitle him to commission, unless he brings the buyer and seller into communication with each other, and the sale results therefrom.

6th. That the seller is entitled to know that the party with whom he is dealing is a customer of the broker, if such be the fact.

7th. That the interview between Austin and Matthews, which resulted in a sale, and the negotiations of the parties with each other, were not effected through the direct agency of the plaintiffs, according to the undisputed evidence in the case.

The court refused so to charge, and proper exceptions were taken to the refusal.

None of these exceptions were well founded. The first proposition presented substantially the same ground on which the motion for the dismissal of the complaint was based; and what has been said in reference to that question is applicable to the said proposition.

The second request was improper for several reasons:

First. It assumed as facts that the defendant had changed his purpose, and also that he had made that change manifest. Those propositions were at least questionable under the evidence. Assuming that the defendant had given Mr. Morgan and E. H. Ludlow & Co. notice, as he testified, of the withdrawal of the property

from sale, and conceding that he had commenced tearing down the building, yet his conversation with Mr. Austin, followed by the sale actually made, tended to "manifest" and prove that his purpose or intention of making a sale, if he could, had not been abandoned.

Second. If there was such change of purpose, the notice of it given to Morgan and E. H. Ludlow & Co. did not affect the plaintiffs. It was not shown that they were notified or had any knowledge of it, or of the fact that the defendant had commenced to take down the building; and it is not, as is claimed by the defendant's counsel, a case in which "the law implies notice, and they are presumed to have had it."

Third. Nothing contained in the request can be considered as revoking the plaintiffs' employment.

The court declined to charge the third proposition, on the special ground that it rested upon hypothesis, and because there was no evidence to sustain it. That ground was correct. It is true that Mr. Austin, in answer to a question by the defendant's counsel, whether he did "employ Mr. Lloyd or talk with him about getting any property" for him, said that he did; but it is evident from what he subsequently said that he did not intend to be understood as answering the first branch of the question affirmatively, and that his answer related to the latter part of it only. He was asked immediately thereafter how long ago it was that he first spoke to Mr. Lloyd, and replied that he thought it was within a week previous to the time of the receipt of the communication from him that the premises were for sale; and on being asked to state what he said to him, he said, "I talked to him about buying property; I asked him if he knew of any property suitable for our purpose;" and being further asked whether he said he "wanted to buy," he replied "Yes." He further said, in answer to other questions, that he, subsequent to the above conversation, received a diagram of the property, and also that Mr.

Lloyd was a member of the masonic fraternity; that he was occasionally in his (Austin's) office, and that he (Austin) "spoke to him about it." The above statements were elicited by inquiries made by the defendant's counsel.

The plaintiffs' counsel then put the following question to him: "That is what the counsel calls employment. Counsel speaks about your having employed him to get the property. Now, was this an employment, or was it a casual conversation?" He answered, "It was a casual conversation that just occurred; and I asked him if he knew of any property, if he had on his books any real estate, or if he knew of any real estate."

He was then asked this question: "That was when Mr. Lloyd came to know that you wanted property of this kind?" He replied, "Yes." It is also true, as claimed by the defendant's counsel in his points, that when the defendant first called on the plaintiffs, as above stated, that they were making up a list of property they had for sale, to send to the trustees of the Masonic Hall Asylum fund, and that such list was subsequently sent. This, instead of proving an employment by the trustees, or by Austin, to *purchase* property for them, shows that the plaintiffs were endeavoring to effect a *sale* to them for and on behalf of other parties by whom they had been employed to make a sale. There is no other evidence which can give color to the facts stated in the third proposition; and the court, for the reason stated by him, properly refused to charge it.

The court also properly refused to charge the jury in the terms of the fourth proposition.

The latter portion of it is erroneous. It is sufficient to entitle a broker to compensation that the sale is effected through his agency as its procuring cause; and if his communications with the purchaser were the cause or means of bringing him and the owner together, and the sale resulted in consequence thereof, the broker is

entitled to recover; and the court so charged, in substance, in the charge subsequently given to the jury.

The fifth proposition is substantially the same as the last part of the fourth proposition; and what is said in relation to that applies to this.

The sixth proposition is not correct. It is to be understood, in the connection in which it is presented, as declaring that, although a party is brought, through the agency and instrumentality of the broker, into a negotiation and dealing with the owner, which actually results in a sale, yet the broker is not entitled to compensation, unless it is made known to the owner that the purchaser is his customer. That is not true. It is sufficient that the purchaser is in fact such customer.

The refusal to charge the seventh proposition was also proper, for the reason stated in reference to the fourth request, and for the additional reason that the court was asked to instruct the jury specifically as to the result and effect of the testimony on a material question of fact.

The court, after these several propositions were submitted, charged thereon, and generally on the whole case; but no questions, except those presented by the refusals to instruct the jury, as above requested and already considered, were raised by the charge than those hereinafter referred to, which will now be examined.

It was stated by the court, in connection with other matters, that it was not the fault of the plaintiffs that Mr. Austin, after ascertaining the name of the owner of the property, went directly to him instead of going to the plaintiffs to conclude the negotiation for the purchase thereof. This statement was excepted to. It was a portion of the charge that if a broker first brings notice of property placed in his hands for sale to a party, and he, after being informed of the terms of sale, deals with the owner and purchases the property, then the broker is entitled to his commissions, although he be not present at the time the contract of sale is executed; that it was

enough that, through his instrumentality, the contract of sale was made. Its only effect in the connection in which it was made (and it could not fairly be understood differently) was to show that the plaintiffs' right to compensation was not, under the circumstances stated, affected or impaired by the fact that the purchaser went to the defendant to make the purchase. There was no error in this. The court, also, in relation to the proposition or request of the defendant to charge "that the seller is entitled to know that the party with whom he is dealing is the customer of the broker, if such be the fact," said that a seller is entitled to know the name of the broker, or that the broker has been instrumental in sending the purchaser, as a matter of protection to himself. This was followed by a statement that the defendant had notice in his first interview with Mr. Austin, which should have put him upon his inquiry as a cautious man, and that he was bound to make the inquiry. This statement was excepted to. Reference was immediately thereafter made to the evidence given by Mr. Austin, that he, in this interview, asked the defendant if the property was still for sale for the sum of $120,000, the price that had been named to him, and that he said he would sell it for that sum. He then added, "that it don't appear that there was any question asked as to where Mr. Austin derived that information. He put no question of that kind to him. Had he done so, he probably would have instantly declared that the Messrs. Lloyd were the persons from whom that information was received, and who had communicated to him all the details necessary to carry out the purchase."

It is evident, from the connection in which the remark excepted to was made, that it was not an instruction, that it was obligatory on the defendant as a *legal* duty or requirement that he should have inquired of Mr. Austin whether the notice or information that the premises had been offered for sale was derived from a broker,

or whether he came to make the purchase through his instrumentality; but it was only a declaration that it was, in view of the fact that he had placed it in the hands of brokers for sale, and had received such notice or information, proper in the exercise of a due and proper precaution, and as a protection against a claim for commission from either of such brokers, to make such inquiry.

There was nothing in this which was exceptionable.

Some exceptions taken to the exclusion of evidence offered by the defendant remain to be considered. This relates to offers to prove what was said by the defendant, Mr. Austin, and Robert Holmes in relation to the sale of the property, at the interviews they had on the subject, and conversations between Jerry T. Smith and Austin and Holmes at the building, in reference to tearing it down and the ownership of the property. No evidence had been given by the plaintiffs relating to the interviews first referred to; and neither of them was present when the conversations took place, and no foundation was laid to contradict any statement that had been previously made by either of those witnesses, and they were excluded on those grounds, and properly. There is no color for the claim by defendant's counsel that the evidence was "competent as a part of the *res gesta* of the contract of sale." There was no question raised as to the making of the contract or its terms that made the proof proper. There was also some testimony offered to prove acts done and expenses incurred by the defendant after the time of the alleged employment of the plaintiffs, and before the sale, upon and in reference to the property, for the purpose of showing that he had made a change of his plans. It was not claimed that the plaintiffs, or either of them, had notice of those acts or expenses. The proof was therefore properly excluded. I will add, in conclusion, that on a full and careful consideration of all the exceptions presented in the case, I do not find that there has

been any error calling for the reversal of the judgment. It must therefore be affirmed, with costs.

All concur.

Judgment affirmed.

DANIEL N. BASH *et al. v.* THOMAS A. HILL *et al.*

1. CONTRACT—*services to effect sale.* Where the plaintiffs are employed by defendants to assist in making a trade in real estate with a promise of a certain compensation in case the same is effected, and do assist in bringing about a trade, they will be entitled to recover the sum agreed to be paid, even though the defendants had changed their proposition, with a view to dispense with the plaintiffs' services, when the plaintiffs received no notice of such fact.
2. When a party engages the services of another to assist him in making an exchange of property, if he desires to dispense with such services, he should give the other party notice. If he does not, and the service is rendered, he will be required to pay for the same.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

The facts are substantially stated in the opinion. The court, on its own motion, gave the following instruction:

"If the jury find from the evidence that the defendants agreed with the plaintiffs, that, in case the plaintiffs would assist the defendants in making the trade in real estate set forth in the declaration; and that in case the said trade should be made, the defendants would pay the plaintiffs the sum of $1,200; and if the jury further find from the evidence, that the plaintiffs, relying upon such agreement of the defendants, did assist the defendants in making such trade, and such trade was in fact made, then the plaintiffs are entitled to recover."

Messrs. *Spafford, McDaid & Wilson*, for the appellants.

Mr. JUSTICE WALKER delivered the opinion of the court:

This suit was brought by appellees, in the Circuit court of Cook county, against appellants, to recover commissions as real estate agents, on property claimed to have been sold, and in the sale of which appellees aided appellants, all parties being real estate brokers. The declaration contains a special count, only, in which it is averred that appellants employed appellees to assist them in effecting a sale of real estate near the city, and for which they agreed to pay appellees $1,200 for their services in consummating the sale; that the sale was made to persons named.

The evidence, on the part of appellees, sustains the averments in the declaration. The contract was sworn to, as set forth in the declaration, by both appellees and one Hawhe. One of appellants swore that the offer was to give appellees $1,000 to assist them in effecting a different sale; or rather, the same property, but on different and better terms. And Crawford, one of the purchasers, testifies that several propositions were made in reference to the exchange of property, which was accomplished. An exchange or sale of the property was made, and appellees swear they aided its completion, and that if any change in the terms occurred, they were not notified of it, or in any wise apprised that the appellants had so changed propositions as to dispense with, or intended to dispense with their services. They deny that when they were employed they were informed of the propositions then pending between the parties.

Appellants, having engaged the services of appellees, should, if they desired to dispense with their services, have given them notice. On the contrary, they seem to

have omitted to do so, thus availing themselves of their services, and when the trade is made they refuse to compensate them.

We fail to see that there was a variance between the declaration and proof. Appellees' evidence sustained the agreement set out in the declaration, while that of appellants is variant.

The jury, however, believed appellees' to be true, and were fully warranted in acting upon it. The evidence would have warranted a verdict for the amount claimed in the declaration, but appellants have no right to complain, as this verdict operates in their favor. We perceive no error in the instruction given by the court on its own motion. It states the law of the cases correctly, and could not have misled the jury. Perceiving no error in the record, the judgment of the Circuit court is affirmed.

Judgment affirmed.

MARVIN A. LAWRENCE *et al v.* ORVILLE E. ATWOOD.

COMMISSIONS OF BROKERS—CHANGE IN TERMS OF SALE.—The commissions of a broker for the sale of real estate are due when he has found a purchaser who buys the property, and his right to such commission is not affected by a modification or change of the terms of payment, made between the buyer and seller, different from the terms first given by the seller to the broker.

APPEAL from the Superior Court of Cook county, the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. F. W. S. Brawley, for appellants; as to the right of a broker to receive his commissions when he has found a purchaser who buys the property, cited Coleman's Heirs v. Meade, 5 Central Law Journal, 409;

McGavock v. Woodfield, 20 How. (S. C.) 221; Rice v. Mayor, 107 Mass. 550: Chapin v. Bridges, 116 Mass. 105; Glentworth v. Luther, 21 Barb. 148; Short v. Millard, 68 Ill. 292; Doty v. Miller, 43 Barb. 529; Middletown v. Findla, 25 Cal. 76; Chilton v. Butler, 1 E. D. Smith, 150; Morgan v. Maxon, 4 E. D. Smith, 626; Clapp v. Hughes, 1 Phil. 382; Barnard v. Monnott, 34 Barb. 90; Koch v. Emmerling, 22 How. 69; Bailey v. Chapman, 41 Mo. 536; Carter v. Webster, 79 Ill. 435; Mooney v. Elder, 56 N. Y. 238; Wharton on Agency, § 328.

Mr. W. H. Holden and *Mr. J. J. Knickerbocker*, for appellee; contended that insolvency of the purchaser is a good defense, and cited Hart v. Hoffman, 44 How. Pr. 168.

That the commissions were to be paid from the sum obtained: Bull v. Price, 20 Eng. Com. L. 113; Briggs v. Rowe, 1 N. Y. Ct. of App. 189.

That the broker must find a *sufficient* purchaser: McClare v. Paine, 49 N. Y. 563; Barnard v. Monnot, 42 N. Y. 204; Fraser v. Wyckoff, 63 N. Y. 448.

That the judgment ought not to be reversed, even though it appear to be against the weight of the testimony, because the finding of the court is equivalent to the verdict of a jury: Lowry v. Orr, 1 Gilm. 70; Bloom v. Crane, 24 Ill. 48; Jenkins v. Brush, 3 Gilm. 18; Sullivan v. Dollins, 13 Ill. 85; Roney v. Monaghan, 3 Gilm. 85; Chase v. Debolt, 2 Gilm. 371; Boyle v. Levings, 24 Ill. 223; Clement v. Bushway, 25 Ill. 200; Ambs v. Honore, 24 Ill. 122; Eastman v. Brown, 32 Ill. 53; Weaver v. Crocker, 49 Ill. 461; Toledo, W. & W. R. R. Co. v. Elliott, 76 Ill. 67.

PLEASANTS, J. This was an action of assumpsit upon the common counts, brought by appellants, to recover commissions claimed to be due from appellee for services as brokers in finding a purchaser of his farm.

The Superior Court, upon a trial without a jury, found the issue for the defendant, overruled a motion for a new trial, and entered judgment against the plaintiffs for costs; from which judgment they appealed, and here assign for error, that the findings were against the law and the evidence.

Both of the averments, upon proof of which their right to recover depends, were controverted, viz: The making of the contract between the parties, and its performance on the part of the plaintiffs.

It appears that the defendant, desiring to sell, applied to Messrs. Phare & Dietrich, brokers, of Chicago, to find a purchaser, and that at their office, in the summer of 1873, Phare introduced the plaintiff Lawrence to the defendant, who there pointed out to him the property on a map, and after some conversation respecting it, which Phare did not hear, went out with him.

Lawrence testifies that at this interview the defendant gave him the price per acre, $250.00, and the terms of payment, one-third or at least one-fourth of the whole amount—less an encumbrance of $12,000, which the purchaser was to assume—in cash, and the residue in equal installments, with interest at one and two years, respectively, and promised to pay if he found a purchaser, a commission of two and one-half per centum.

It further appears that Lawrence made efforts to effect a sale, in the course of which he brought the property and terms to the attention of Messrs. Kerr, Davison and Welch, who were also doing business as real estate brokers in Chicago; that Kerr called on defendant with a view to purchase for himself and others, and upon an alleged misunderstanding as to the property offered declined to take it, but shortly afterward arranged for a sale with Henry Crawford whom he introduced to defendant, and which, after some negotiations between them was consummated on the 19th of August, 1873, for

the price originally proposed, but with a modification of the terms of payment.

On that day the defendant executed his deed to Crawford for $14,750, including the incumbrance which was assumed as a part of the consideration, and Crawford paid him $1,000 in cash, and gave his notes for the residue, in three equal installments—one at ninety days, and the others at one and two years, respectively, and also other notes for the interest on the three so given, from date to maturity, and a deed of trust of the same premises to secure them. Failing, however, to meet the first when due, he re-conveyed the property, and his notes were cancelled. Lawrence swears that by the agrement between them, defendant was to pay one-third of the commissions to Phare & Dietrich directly, on the consummation of the sale, and the other two-thirds to him, of which he was to pay one-half to Kerr, Davison & Welch—thus distributing the whole amount equally among the three brokers employed in effecting the sale, according to a custom recognized by them. He claims in this suit only the two-thirds. Defendant positively denies that he ever promised the plaintiff to pay him any commissions, or dealt with him at all as a broker. He says that Lawrence was introduced to him as a person "who was dealing in land largely," and was understood by him as "buying the property, or talking of investing in it himself;" that he said nothing about taking it to sell for him, and that no conversation in relation to commissions was had between them until after the trade was made.

He claims that he employed Phare & Dietrich only, and that if any commission had been earned he would be liable therefor to them alone; but further claims that commissions were not to be due until the cash payment of one-third the price was fully made, and that it never was so made.

The question then is, on which side, if either, and how

great, if any, is the preponderance. To corroborate the statements of the defendant or of any of them on this point—the making of a contract with plaintiff—we find no evidence or circumstance in all the record; while those of the plaintiff appear to us to be strongly supported by the testimony of disinterested and even of adverse witnesses. Thus his active agency in the matter of procuring a purchaser, and defendant's actual knowledge of it at the time, are shown by Welch and by the defendant himself. The former testifies that the property was brought to the attention of his firm by the plaintiff, and the latter that when Kerr came to see him, after the property was pointed out, he declined to take it, because as he said, it was not the property that Lawrence gave him, and thereupon "Lawrence was sent for, and they had a dispute about it;" and further, that after that, "Lawrence, Phare and Kerr all talked the property up."

So the repeated recognition by the defendant of plaintiffs' right to participate equally with the two other firms, in the commissions to be paid, is proved by the testimony of Welch. The defendant also distinctly admitted it on the witness stand, and the receipt which he took from William H. Phare and offered in evidence recites it. He further stated that he had actually offered to Lawrence to pay him his share out of a check of Crawford, if he would cash it, although he says this offer was accompanied with the declaration that no commissions were due him, but whether because there was no contract or no performance, does not appear. We regard the inference from these collateral facts as irresistible, that plaintiff Lawrence was employed as a broker in this matter, either by the defendant or by Phare and Deitrich with his knowledge and probably by both; but if by either it is sufficient. We further regard it as fully proved that the commissions were to be two and one-half per centum; and whether the whole or only two-thirds or one-third was to be paid by defendant to plaintiffs is unnecessary here to deter-

mine, since the declaration was upon the *indebitatus* counts, and if either was promised and the plaintiffs performed their part the finding and judgment of the Superior Court was erroneous.

Upon the other issue there is no dispute about the facts; the only question being whether they constitute performance by the plaintiffs of their contract to find a purchaser.

As a means to that end they employed another broker, and he procured and introduced as such a party who was so accepted by the defendant and consummated the purchase, but upon terms differing in some particulars from those first offered; that is, instead of paying down in cash $10,916.66, and giving two notes for the same amount each, at one and two years, with interest, he paid down $1,000, and gave three notes for $10,584, $10,583 and $10,583, at ninety days, one year and two years, respectively, with interest. Thus, although a portion of the proposed cash payment was deferred, it was but for a short time, and the proposed deferred payments were somewhat lessened. The change was not substantial. It was not effected by any agency or neglect of the plaintiffs, but by negotiations to which defendant was an immediate and principal party, and was by him freely consented to.

Such a change so effected should not, in our opinion, be held to defeat the claim of the broker for his commissions. Nor should the failure of the purchaser to pay the ninety-day note at maturity, and the consequent cancellation of the purchase by agreement of the parties to it, have that effect. He was none the less a purchaser within the meaning of the contract with plaintiffs. His purchase was in no degree contingent or provisional. An absolute deed was executed to him, which conveyed the entire title, and for so much of the consideration originally required as he did not pay in money he made and executed and delivered to the defendant enforceable con-

tracts and securities of the character originally contemplated and to his acceptance and satisfaction at the time.

There is no pretense of fraud, misrepresentation or negligence on the part of the plaintiffs, or of the purchaser.

They were not guarantors of his ability to make any deferred payment, nor could their right to commissions be affected by the want of it—since he was accepted by the defendant, complied with all the terms required to consummate the purchase, and did actually consummate it. This question of ability, as affecting the broker's right in a case free from fraud, can only arise when the proposed purchaser is rejected, notwithstanding his offer and readiness to comply with such terms and thus to consummate the purchase.

Here the defendant might have insisted upon the cash for one-third of the price, according to the terms given to the broker, and compelled its payment, or refused to sell, and so have clearly avoided all liability for commissions; or, distrusting Crawford's ability to make the deferred payments, notwithstanding his offer and readiness to comply with all the terms to be presently fulfilled, he might have rejected him on that ground, and in that case have defended against the claims for commissions by making proofs sufficient to overcome the legal presumption of ability; but he did neither. He consented at the instance of the purchaser to some modification of the terms he had submitted—not however making a substantially different contract, as in some of the cases cited—and fully completed the sale accordingly.

Thereupon the broker became entitled to his commissions, unless his right was postponed by special agreement: McGavock v. Woodfield, 20 How. 221; Coleman's Heirs v. Meade; 5 Cent. Law Jour. 409; Wharton on Agency, Sec. 328; Bernard v. Monnot, 42 N. Y. 204; Frazer v. Wyckoff, 63 N. Y. 448; Carter v. Webster, 79 Ill. 436.

The defendant claimed that it was postponed until, and made contingent upon, the full payment of the ninety day note. All the proof offered by him on this point was his own statement that such was his agreement with Phare & Dietrich, and a receipt from Phare containing a recital to the same effect. But such an agreement could not affect the rights of plaintiffs, who were strangers to it, and the admission of any evidence of it against their objection was therefore improper.

It is clear that commissions were to be due when a purchaser should be found, which would certainly be when the purchase should be made. This was satisfactory to the defendant, because the terms of sale originally proposed contemplated that one-third or one-fourth of the price would then be paid. But the ninety day note with the $1,000 cash paid, would amount to more than one-third of the whole price after deducting the incumbrance which was assumed. It does not appear that plaintiffs had any notice or suspicion of the change in the terms until after it was made and the sale was consummated, and we discover no evidence of any consent on their part afterward to the further postponement and contingency of their claim to accord with these changes in the terms of sale. We are of opinion, then, that the fact of performance of the contract on the part of plaintiffs was also clearly established, and like that of the contract made, by so great a preponderance of evidence as to make the finding of the issue against them error; for which we reverse the judgment entered thereon and remand the cause.

Judgment reversed and cause remanded.

ADOLPH H. UPHOFF *v.* BARTON A. ULRICH *et al.*

1. REAL ESTATE BROKER—COMMISSIONS.—Appellees sued appellant for commissions, on the usual terms, for effecting a sale or exchange of real estate. The evidence showed that whatever negotiations in regard to the sale that were brought about through appellees' agency, failed; a sale was not effected and appellees were notified that appellant's offer was withdrawn. Having failed to accomplish the sale according to their undertaking, appellees were not entitled to any commissions.
2. SUBSEQUENT SALE THROUGH OTHER MEANS.—The parties to the negotiation were subsequently brought together through other influences, and a trade was consummated on the basis originally proposed; but appellant's acceptance, after revocation of the agency, of an offer made during its continuance, would not subject him to liability to appellees for commissions, the revocation having been made in good faith, with no intention of a renewal of the negotiations.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. Frank J. Crawford, for appellant; contending that there was no employment of appellees, and none can be implied from the facts in the case, cited Atwater v. Lockwood, 39 Conn. 45; McDonald v. Lord, 26 How. Pr. 404; Carman v. Beach, 63 N. Y. 97; Wharton on Agency, § 330.

Not effecting an exchange upon the terms proposed, appellees are not entitled to commissions: Coleman's Ex'rs v. Meade, 5 Cent. Law Jour. 409; McGavock v. Woodlief, 20 How. 221; Barnard v. Monnot, 42 N. Y. 204; McClave v. Paine, 49 N. Y. 561; Carter v. Webster, 79 Ill. 435.

The transaction must be completed before commissions are earned: Wharton on Agency, § 325; Simpson et al. v. Lamb, 84 E. C. L. 603; Fraser v. Wyckoff, 63 N. Y. 448; Lawrence v. Atwood, 1 Bradwell, 217; Short v. Millard, 68 Ill. 292; Baxter v. Lamont, 60 Ill. 237; Hoyt v. Shipherd et al. 70 Ill. 309; Moss v. Burling et al. 31 N. Y. 462.

Mr. Geo. H. Leonard, for appellees; argued that it being through the instrumentality of appellees that the

parties were brought together and negotiations begun, they are entitled to commissions, though appellant afterward made the exchange himself; and cited Carter v. Webster, 79 Ill. 453; McGovern v. Wooley, 20 So. Car. 22; Lane v. Albright, 49 Ind. 275; Clendenon v. Pancost, 75 Penn. 213; Rees v. Spruance, 45 Ill. 308; Short v. Millard, 68 Ill. 292; Jones v. Adler, 34 Mo. 440; Woods v. Stephens, 46 Mo. 555; Barnard v. Monnot, 6 Am. Law Reg. 209; Coleman's Ex'rs v. Meade, 5 Cent. Law Jour. 409.

Appellees were appellant's brokers; they were not agents; Saladin v. Mitchell, 45 Ill. 79.

PLEASANTS, J. Appellees, who were brokers, recovered a judgment against appellant in *assumpsit* for two hundred and fifty dollars as their commissions upon an exchange of his property.

The contract, as stated in the special count, was that he employed them "to procure some person ready, able and willing to purchase" certain real estate which he claimed to own and control, upon an agreement to pay them for their services so much as was customary; that is, that he employed them, generally, to procure a sale upon the usual commissions.

The evidence shows that if he employed them at all, it was only to procure a particular exchange. Casually meeting Ulrich in the street he told him that having made a certain sale, he was now looking for a good investment; that he wanted to get it in business property, and would put in, together with some money, his farm in Northfield or a house and lot on Third Avenue, or both; but it is not pretended that any contract was then entered into. Some days afterward, upon their written and repeated request, he called at their office, and being there shown descriptions of several pieces of property which they had in hand for sale or exchange, he expressed a preference for that of one Matthews, situate on Clark

street, and left an offer for it of said farm and the house and lot, subject to an encumbrance of four thousand dollars. No other disposition of them was proposed or authorized by him.

Thus his attitude seems to have been that of a purchaser, making an offer to appellees as the brokers of Matthews, rather than of a seller, as represented by the declaration. Nothing was said about commissions, and upon the whole evidence it may well be doubted whether either he or they then understood that he was employing them as his agents. But if he was, it was only to submit to Matthews the specific offer stated and procure its acceptance—a contract which we think substantially variant from the one so alleged.

The declaration, however, contained the common counts also, and upon them the judgment might be supported, if it had been shown that the contract, although different from that set forth in the special count, had been on the part of appellees fully performed.

On this subject the undisputed proof is that Matthews refused the offer so made, and in turn proposed to exchange if appellant would remove the incumbrance on his Third Avenue property, which the latter also refused; that several interviews were had between the parties, and the negotiations were continued during a period of some two months, until about Christmas, when it appeared that neither would make any concession and the effort to effect a trade was abandoned. Appellant notified appellees that he withdrew his offer, and Matthews put his property into the hands of other brokers. Upon this state of facts appellees could not recover under the common counts. Their undertaking, if any, was to procure an agreement by Matthews for an exchange upon the terms offered by appellant, or upon some other terms acceptable to him; and having failed to accomplish it, according to all the authorities, they earned no commissions.

But it further appears that a month or six weeks later the parties were again brought together under other influences, and on the 19th of February the trade was consummated upon the terms first proposed by Matthews; and it is contended that appellant's acceptance, after revocation of the agency, of an offer made during its continuance, subjects him to liability for commissions.

None of the authorities cited are found to hold so broad a proposition, and upon principle we think the question of liability would turn upon the good or bad faith of the previous refusal and revocation.

Beach v. Creswell, 3 Md. 196, not cited by counsel, is more nearly in point than any other case we have seen. There the plaintiff, having been employed by the trustee of certain property to procure a purchaser at ten thousand dollars, found and reported a party who said he might take it if he could barter bank stock for it. This was done with the knowledge and approval of the defendant, who was one of the *cestuis que trust*. Afterward she purchased the interest of the others and acquired the legal title. Thereupon the plaintiff was notified of the revocation of his power. She then sold to the party so found, for the price stated, in cash, and plaintiff brought the suit for his commissions; but he disclaimed bad faith on the part of the defendant, and for that reason it was held that he could not recover.

We are inclined to hold that appellant's acceptance, after revocation of appellee's authority, of an offer which he had refused before it, is not of itself evidence of bad faith, and if it is, that it is clearly outweighed by the positive testimony of appellant and of Matthews that when the negotiation under appellees ended neither of them intended or expected to renew it.

In our opinion, then, the plaintiff failed to make a case under either of the counts. The judgment of the Circuit court is therefore reversed and the cause remanded.

Reversed and remanded.

LYNCH *v.* MCKENNA.

(58 How. (N.Y.) Pr. 42.)

McKenna employed Lynch, a broker, to purchase two lots for him. Lynch conducted the negotiations until the owner finally agreed to accept $32,000 net for them. The owner told Lynch that he would pay no commission on a sale at that price. Lynch communicated these facts to his customer, who said that the commission was a small matter, and that he would see to it or take care of it. The matter remained in this condition for about one month, when McKenna went personally to the owner and completed the purchase, at the net price given by the owner to Lynch. *Held*, that the purchaser was liable for the brokerage.

INDEX TO CASES CITED.

A.

PAGE

Abbey v. Chase, 6 Cush. 54.....82, 92
Ackenburgh v. McCool, 36 Ind. 473..... 25
Adams v. Stevens, 49 Me. 362..... 67
—— v. Power, 52 Miss. 828..... 58
Albany Fire Insurance Co. v. Bay, 4 N. Y. 9..... 40
Alexander v. N. W. etc. Univ., 57 Ind. 466..... 29
—— v. Breddan, 14 B. Monr. 154..... 116
—— v. Daly, 36 Cal. 90..... 38
Alwood v. Mansfield, 59 Ill. 496..... 27
Am. Law. Reg. N. S., July, 1880..... 49
Ames v. St. Paul, etc. R. R. Co., 12 Min. 413..... 94
Amory v. Hamilton, 17 Mass. 103..... 55
Andrews v. Speer, 8 Allen 412..... 66
—— v. Allen, 4 Harr. 452..... 97
Angle v. Miner, etc. R. R. Co., 9 Ia. 487..... 7
Ankany v McMahon, 3 Scam. 12..... 99
Appleton v. Binks, 5 East R. 148.....96, 100
Armstrong v. Elliott, 29 Mich. 485..... 25
Arrington v. Casey, 5 Baxter 609..... 120
Aspinwall v. Torrance, 1 Lans. 381..... 82
Atwater v. Lockwood, 39 Conn. 45.....16, 106

B.

Bach v. Emerick, 53 N. Y. Sup. Ct. 548..... 126
Bacon's Abr..... 8
Bailey v. Chapman, 41 Mo. 536..... 113
Bain v. Brown, 56 N. Y. 285..... 25
Baines v. Burbridge, 15 La. Ann. 628..... 55
Baker v. Chambers, 4 Greene 428..... 90
—— v. Byrne, 10 Miss. 193..... 54

PAGE
Banks v. Judah, 8 Conn. 145..... 25
Bank of Hamburgh v. Way, 3 Strobk. 87..... 90
Bank of Beloit v. Beale, 34 N. Y. 473..... 55
Bash v. Hill, 62 Ill. 216.....18, 20
Ballow v. Talbot, 16 Mass. 461..... 93
Bamford v. Shuttleworth, 11 Ad. & El. 296.....102, 103
Banorgee v. Hovey, 5 Mass. 11..... 41
Bantan v. Savage, 12 Nev. 157..... 70
Barbour v. Craig, 6 Litt. 213..... 55
Barker v. Garvey, 83 Ill. 184..... 94
Barnard v Monnot, 34 Barb. 90.....109, 124, 125
Barnes v. Roberts, 5 Bosw.....124, 125
Barring v. Pierce, 5 W. & S. 548..... 39
Barry v. Coombe, 1 Pet. 650..... 77
Bartlett v. Blaine, 83 Ill. 25..... 70
Bass v. Randall, 1 Minn. 404..... 90
Bates v. Copeland, 9 Reporter 492..... 31
Battzen v. Nicolay, 53 N. Y. 467..... 93
Baxter v. Lamont, 60 Ill. 237..... 118
Bay v. Cooke, 2 N. J. 343..... 90
Bayley v. Chadwick, 39 L. T. R., N. S., 429..... 120
Beard v. Kirk, 11 N. H. 398.....50, 51
Beach v. Cresswell, 3 Md. 196..... 118
Beebee v. Knapp, 28 Mich. 53..... 68
Bell v. Kaiser, 50 Mo. 150..... 113
—— v. Ryerson, 11 Ia. 233..... 55
Bennett v. Kidder, 5 Daly 512..... 123
Bergen v. Ebey, 88 Ill. 269..... 62
Berkey v. Judd, 22 Minn. 287..... 37
Betts v. Gunn, 31 Ala. 219..... 66
Bickford v. First N. Bk., 42 Ill. 239..... 96
Bingham v. Stewart, 13 Minn. 106.....96, 97
Bird v. Klener, 41 Wis. 134..... 69
Bishop v. Stewart, 13 Nev. 25..... 55
Bissell v. Terry, 69 Ill. 184..... 115
Blankenship v. Ryerson, 30 Ala. 426..... 113
Bloomer v. Waldron, 3 Hill 361..... 40
Blount v. Robeson, 3 Jones Eq. 73..... 27
Blum v. Robertson, 24 Cal. 127..... 39

PAGE
Bocock v. Pavey, 8 Ohio St. 270 12
Bohanan v. Bohanan, 3 Bradw. 502 62
Bollman v. Loomis, 41 Conn. 581 31
Bosseau v. O'Brien, 4 Biss. 395 ..... 40, 57
Bond v. Ramsey, 89 Ill. 29 70
Bowman v. Caruthers, 40 Ind. 90 70
Bradford v. Kimberly, 3 Johns. Ch. 431 118
Breden v. Dubarry, 14 Serg. & R. 27 55
Breithkaupt v. Thurmond, 3 Rich. S C. 216 55
Bremond v. McLean, 45 Tex. 11 70
Brenman v. Perry, 7 Phil., Pa 113
Briggs v. Rowe, 1 Abb. App. 189 ..... 18, 19, 106
Broadwell v. Chapin, 2 Bradw. 511 92
Bronson v. Coffin, 118 Mass. 156 30
Brookshire v. Brookshire, 8 Ired. 674 50
Brown v. Pforr, 38 Cal. 550 130
—— v. Post, 1 Hun. N. Y. 304 27
—— v. Lampheer, 35 Vt. 252 67
Browne on Stat. of Frauds 57, 76, 78, 79, 83, 84
Brownlee v. Hewitt, 1 Mo. App. 360 68
Bruce v. Davenport, 36 Barb. 349 24
Budd v. Zoller, 52 Mo. 238 114
Bude v. Roberts, 12 Wend. 413 100
Brigham v. Peters, 1 Gray 139 55
Butterfield v. Beall, 3 Ind. 208 8
Butler v. Hackitt, 4 Desau. 651 26
Byars v. Doores, 20 Mo. 284 93

C.

Canada v. Marcy, 13 Gray 373 66
Carman v. Beach, 63 N. Y. 97 ..... 31, 107
—— v. Putty, 21 N. Y. 549 115
Carrington v. Whittington, 26 Mo. 313 92
Carson v. Smith, 5 Minn, 78 38
Carter v. Webster, 79 Ill. 435 ..... 110, 121
Casey v. Casey, 14 Ill. 112 26
Cassare v. Hinman, 6 Bosw. 8 72
Cavender v. Waldingham, 2 Mo. App. 551 ..... 111, 116, 128
Cent. Ins. Co. v. Prot. Ins. Co. 14 N. Y. 85 31

PAGE
Cent. Law Jour.....30, 63, 79, 87
Chandler v. Sutton, 5 Daly 112..... 122
Charlton v. Weed, 11 Heisk. 19..... 120
Chase v. Dana, 44 Ill. 262..... 11
—— v. Debolt, 2 Gilm. 371..... 91
Cherries v. Bleecker, 12 Johns, 300..... 55
Chi. Dock Co. v. Kenzie, 49 Ill. 289..... 43
Chilton v. Butler, 1 E. D. Smith 150..... 109
—— v. The People, 66 Ill. 501..... 98
Chouteau v. Paul. 3 Mo. 260..... 97
Clapp v. Hughes, 1 Phil. 382..... 110
—— v. Graham, 6 Wheat. 577..... 8
—— v. Van Reinsdeck, 9 Cranch. 153..... 54
—— v. Foster, 8 Vt. 98..... 93
Clayton v. Merritt, 52 Miss. 353..... 49
Clemmens v. Drew, 2 Jones Eq. 314..... 66
Clendenan v. Pencost, 75 Penn. 213..... 31
—— v. Meade, Cent. Law Jour. 409..... 118
Coffman v. Harrison, 24 Mo. 524..... 93
Coleman v. Garringue, 18 Barb. 60.....34, 110, 111
—— v. Stark, 1 Oreg. 115.....
—— v. Meade, 13 Bushn. 358.....110, 124
Collins v. Smith, 18 Ill. 160.....9, 83
—— v. Suau, 7 Root 623..... 57
—— v. Buckeye Ins. Co., 17 Ohio St. 215..... 97
Colvin v. Holbrook, 2 Comst. 126..... 102
Com. Bank v. Norton, 1 Hill 501..... 12
—— v. Jones, 18 Texas 811..... 57
Como v. Pt. Henry Co. 12 Barb. 27..... 55
Condit v. Blackwell, 22 N. J. Eq. 481..... 27
—— v. Baldwin, 7 Smith 219..... 73
Conkey v. Bond, 36 N. Y. 427..... 25
Content v. Servos, 3 Barb. 128..... 40
Cook v. Kroencke, 4 Daly 268..... 127
Cooper v. Rampkin, 5 Binn. 613..... 41
Copeland v. Mer. Ins. Co. 6 Pick. 198..... 25
Corning v. Calvert, 2 Hilt. 56.....110, 114, 125
Corser v. Paul, 41 N. H. 24..... 55
Cossitt v Hobbs, 56 Ill. 231..... 35

PAGE
Costigan v. Newland, 12 Barb. 456 120
Cottom v. Holliday, 59 Ill. 176 ..... 13, 31
Couch v. Ingersoll, 2 Pick. 292 97
Courcier v. Riter, 4 Wash. 549 55
Cowan v. Wheeler, 31 Me. 439 55
Crane v. Onderdonk, 67 Barb. 47 74
Crozier v. Carr, 11 Tex. 376 ..... 41, 52
Cumberland, etc. Co. v. Sherman, 30 Barb. 553 25
Cummings v. Williams, 1 Sand. Ch. 17 40
Curts v. Scoles, 1 Ia. 474 91
Cushman v. Glover, 11 Ill. 600 ..... 11, 12, 19
—— v. Gori, 1 Hilt. 356 ..... 105, 106

D.

Davenport v. Peoria Ins. Co. 17 Ia. 276 33
Davis v. Shields, 26 Wend. 3 79
—— v. Burton, 3 Scam. 41 99
—— v. Windsor Sav. Bk., 46 Vt. 728 49
DeBernard v. Harding, 8 Exch. 822 113
Deep River, etc. Co. v. Fox, 4 Ired. Eq. 61 25
DeLaplaine v. Turney, 44 Wis. 113
Dennis v. Bullitt, 1 Blackf. 241 93
—— v. Charlisk, 13 N. Y Sup. Ct. 21 121
DeRutter v. Mulrow, 16 Cal. 505 37
Despatch v. Bellamy Mfg. Co. 12 N. H. 205 54
DeVagner v. Robinson, 5 Weekly Rep. 509 40
Dickerman v. Ashton, 21 Minn. 538 100
Dickerson v. Conway, 12 Allen 487 57
Doan v. Duncan, 17 Ill. 274 ..... 97, 100
Dodge v Lambert, 3 Bosw. 570 55
—— v. McDonnell, 14 Wis. 553 57
—— v. Hopkins, 14 Ib. 630 100
Dorsey v. Clark, 4 Harr. & J. 551 27
Doty v. Wilder, 15 Ill. 407 42
—— v. Miller, 43 Barb. 529 ..... 109, 110, 113
Doughaday v. Crowell, 11 N. J. Eq. 201 100
Draper v. Mas. Steam Heating Co. 5 Allen 338 91
Draughan v. Quillan, 23 La. Ann. 237 31
Drumwright v. Phillpot, 16 Ga. 424 45

PAGE
Drury v. Newman, 99 Mass. 256 108
Duffy v. Hobson, 40 Cal. 240 124
DuFlon v. Powers, 14 Abb. N. Y. Prac. 391 69
Dulaney v. Rogers, 64 Mo. 201 70
Dunbar v. Bonested, 3 Scam. 32 69
Duncan v. Niles, 32 Ill. 532 ..... 10, 82, 85, 90, 91, 92
Dunlap v. Richards, 2 E. D. Smith 181 ..... 28, 31
Dunn v. White, 63 Mo. 181 70
Dunton v. Chamberlin, 1 Bradw. 361 92
Dupont v. Worthman, 10 Cal. 354 40
Dyer v. Sutherland, 75 Ill. 583 ..... 15, 21

E.

Eames v. Preston, 20 Ill. 389 99
Earp v. Cummings, 44 Penn. St. 394 ..... 16, 104, 121
Edmunds' Appeal, 59 Penn. St. 220 67
Elam v. Carruth, 2 La. Ann. 275 .....
Elder v. Allison, 45 Ga. 13 69
Eldridge v. Walker, 80 Ill. 270 25
—— v. Holway, 18 Id. 445 12
Elkins v. Boston, etc. R. R. Co 19 N. H. 337 94
Elwell v. Chamberlin, 31 N. Y. 611 55
Ely vs. Hanford, 65 Ill. 267 13
Epis. Ch. etc. v. Variance, 28 Barb. 644 91
Erickson v. Compton, 6 How. Pr. 471 94
Esmay v. Gorton, 18 Ill. 483 82
Estes v. Furlong, 59 Ill. 299 61
Evans v. Hughes, 76 Ill. 115 118
Everhart v. Searle, 74 Penn. St. 256 ..... 29, 31, 126
Exch. Bk. v. Montieth, 26 N. Y. 515 12

F.

Farnsworth v. Hemmer, 1 Allen 494 30
Fauntleroy v. Wilcox, 80 Ill. 477 ..... 69, 70
Fay v. Winchester, 4 Metc. 513 37
Fellows v. Commissioners, 36 Barb. 655 57
Fisher's Appeal, 34 Penn. St. 29 26
Fisher v. Stevens, 16 Ill. 397 55
—— v. Dillon, 62 Ill. 379 71
—— v. Drewett, 39 L. T. N. S., 253 114

PAGE
Fisher v. Dynes, 62 Ind. 348 129
Fish v. Cleland, 33 Ill. 238 64
Fladcke v. Mayor, etc. 28 N. J. Eq. 110 67
Fletcher v. Dysant, 9 B. Mowr. 413 51
Folger v. Mitchell, 3 Pick. 396 55
Force v. Dutcher, 18 N. J. Eq. 401 .....
Foster v. Heath, 11 Wend. 478 90
Fox v. Mackreth, 2 Bro. Ch. 420 61
—— v. Williams, 21 How. 287 94
Franklin v. Robinson, 1 Johns. Ch. 157 118
Fraser v. Wyckoff, 63 N. Y. 445 107
Freeman v. Venner, 120 Mass. 424 70
Frenzel v. Miller, 37 Ind. 1 ..... 69, 71
Frontine v. Small, 3 Ld. Raym. 1418 96
Fuller v. Ellis, 39 Vt. 345 118
Furman v. Titus, 40 N. Y. Sup. Ct. 284 70

G.

Gage v. Gage, 30 N. H. 420 8
Gardner v. Ogden, 22 N. Y. Ct. App. 327 ..... 25, 26
—— v. Gardner, 5 Cush. 483 95
Garnhart v. Reutchler, 72 Ill. 535 ..... 113, 118, 127
Gaylord v. Stebbings, 4 Kans. 42 40
Gerrish v. Decker, 70 Ill. 470 36
Geylin v. DeVilleroy, 2 Houst. 311 7
Gillet v. Corum, 7 Kans. 156 ..... 18, 106, 114
Girard v. Elberry, 45 Ia 322 66
Glenn v. Slater, 42 Id. 107 66
—— v. Davidson, 3 Md. 365 11
Glentworth v. Luther, 21 Barb. 145 ..... 109, 110, 115, 125
Gokey v. Knapp, 44 Ia. 32 ..... 41, 57
Goldsmith v. Obernier, 3 E. D. Smith 121 123
Goodell v. Woodruff, 20 Ill. 191 54
Goodwin v. Robinson, 30 Ark. 535 69
Gordon v. Clapp, 113 Mass. 335 31
Gottschalk v. Jennings, 1 La. Ann. 5 121
Grady v. Am. Cent. Ins. Co. 60 Mo. 116 12
Grant v. Hardy, 33 Wis. 668 128
Graves v. Legg, 34 Eng. L. & Eq. 489 36

PAGE
Greenleaf v. Beebee, 80 Ill. 520 6
Grinnell v. Buchanan, 1 Daly 588 12
Grymmes v. Sanders, 93 U. S. 55 62
Guard. Life Ins. Co. v. Hogan, 80 Ill. 35 70

H.

Hague v. O'Connor, 1 Sweeney 472 113
Haines v. Begner, 9 Phil. 51 124
Haldenby v. Spafford, 1 Bevan 395 40
Hall v. Harper, 17 Ill. 72 55
—— v. Cockrill, 28 Ala. 507 90
Hancock v. Byrne, 5 Dana 514 50
—— v. Yonker, 83 Ill. 208 92
—— v. Gomery, 58 Barb. 490 102
Hanford v. Shafer, 4 Daly 243 119
Hardeman v. Ford, 12 Ga. 205 57
Harris v. Tyson, 24 Penn. St. 347 61
Harrison v. Burtnett, 2 Daly 189 122
—— v. Long, 4 Dessau 110 15
Harralson v. Stein, 50 Ala. 347 12
Hart v. Hoffman, 44 How. Pr. 168 127
Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180 11
Hatch v. Coddington, 5 Otto 48 11
Hawkins v. Taylor, 7 Rep. 105 6
—— v. Chance, 19 Pick. 502 36
Haydock v. Stow, 40 N. Y. 263 35
Hegeman v. Johnson, 35 Barb. 200 90
Henderson v. Cummings, 44 Ill. 325 55
—— v. Ford, 46 Tex. 627 49
Hendrick v. Korne, 4 Daly 75 24
Herman on Mortgages 40
—— v. Martineau, 1 Wis. 151 30
High v. Kistner, 44 Ia. 79 70
Hilliard on Vendors 66, 69, 70, 71
Hilliard on Real Property 98, 99
Hinckley v. Arey, 27 Me. 362 31
Hinds v. Henry, 36 N. J. L. 328 108
Hingdon v. Thomas, 1 Harr. & Gill. 139 78
Hogan v. Hogan, 89 Ill. 427 6

PAGE
Holbrook v. O'Connor, 60 Me. 578..... 70
Holly v. Townsend, 2 Hilt. 34..... 105
—— v. Goslins, 3 E. D. Smith, 262 .....110, 114, 115, 125
Holmes v. Holmes, 5 Seld. 527..... 115
Hopkins v. Lancaster, 4 Miller La. Ann. 64..... 110
—— v. McHaffy, 11 Serg. & R. 129.....82, 92
Houseman v. Girard, etc. 81 Penn. St. 256..... 28
Hovey v. Townsend, 16 How. Pr. 125..... 104
Hoyt v. Jacques, 2 Cent. Law. Jour. 278..... 40
—— v. Shepherd, 70 Ill. 309.....109, 113
Hugerford v. Hicks, 39 Conn. 259..... 17
Hughes v. Washington, 72 Ill. 84..... 25
Hull v. Huntoon, 17 Vt. 244..... 90
Hunter v. Bilyea, 30 Ill. 228..... 66
Hunt v. Gregg, 8 Blackf. 105..... 36
—— v. Rousmanier's Adms. 8 Wheat. 174..... 48
Hutchinson v. Johnson, 33 Barb. 392..... 63

I.

Ill. Cent. R. R. Co. v. Cassell, 17 Ill. 389..... 66
Ingraham v. Edwards, 64 Ill. 526..... 57
Ins. Co. v. Smith, 3 Wharton 521..... 95
Ish v. Crane, 8 Ohio St. 520.....

J.

Jacobs v. Kolff, 2 Hilt. 133.....105, 108
James v. Patten, 2 Seld. 9..... 79
Jasup v. City Bank, 14 Wis. 331..... 45
Jefts v. York, 4 Cush. 371..... 92
Johnston v. Dodge, 17 Ill. 433..... 35
—— v. Co. Stark, 24 Ill. 75..... 45
—— v. McGrader, 15 Mo. 365.. .....41, 100
Johnston v. Berry, 3 Bradw. 256..... 55
Jones on Mortgages..... 40
—— v. Donnman, 42 B. 235.. 91
—— v. Adler, 34 Mo. 440..... ....31, 111, 120
Joor v. Sullivan, 5 La. Ann. 177..... 12

K.

Kantsky v. Atwood, 79 Ill. 204..... 96
Kehler v. Kemble, 26 La. Ann. 93..... 55

PAGE
Kent's Commentaries 8
Kerfoot v. Hyman, 52 Ill. 512 ..... 13, 24, 26
Kerr v. Sharp, 83 Ill. 198 57
Kimberly v. Henderson, 29 Md. 512 105
King v. Handy, 2 Bradw. 212 96
Kirby v. Grigsby, 8 Leigh 387 .....
Knapp v. Wallace, 41 N. Y. 477 ..... 110, 113
Koch v. Emmerling, 22 How. 69 ..... 113, 115, 124
Kohl v. Lindley, 23 Ill. 195 ..... 64, 70
Kostenbader v. Peters, 80 Penn. St. 438 66
Kutz v. Fisher, 8 Kans. 90 25

L.

Lambden v. Sharp, 9 Humph. 224 99
Lamothe v. St. Louis, etc. R. R. Co. 17 Mo. 204 50
Lampkins v. Wilson, 5 Ilgisk. 555 40
Lane v. Albright, 49 Ind. 275 ..... 31, 115
Law v. Cross, 1 Black. 533 55
Lawrence v. Taylor, 5 Hill 107 36
—— v. Atwood, 1 Bradw. 217 ..... 17, 110
Layng v. Stewart, 1 W. & S. 822 90
Lea v. Bringier, 19 La. Ann. 197 6
Ledbetter v. Walker, 31 Ala. 175 100
Leete v. Norton, 43 Conn. 219 125
Leevy v. Locks, 29 Ill. 313 ..... 82, 90, 92
Le Moyne v. Quimby, 70 Ill. 399 48
Leroux v. Brown, 12 C. B. 801 82
LeRoy v. Beard, 8 How. 441 39
Lester v. Kinne, 32 Conn. 7 57
Lewin on Trusts 40
Lewis v. Lamphere, 79 Ill. 187 67
—— v. Kerr, 17 Ia. 73 57
Lidrick v. Rice, 13 Ia. 214 57
Lincoln v. McCletchin, 36 Conn. 136 120
Lindsley v. Malone, 23 Penn. St. 24 55
Livingston v. Peru, 2 Paige 390 64
Lloyd v. Colston, 5 Busb. 587 28
—— v. Mathews, 51 N. Y. 124 ..... 118, 119
Lockwood v. Levick, 8 J. Scott N. S. 603 125

PAGE
London, etc. Soc. v. Hagerstown Bank, 86 Penn. St. 498..... 38
Long v. Coburn, 11 Mass. 97..... 93
—— v. Hartwell, 34 N. J. L. 116..... 100
Loury v. Harris, 12 Minn. 255..... 55
Love v. Miller, 53 Ind. 294..... 125
—— v. Hess, 62 Ib. 255..... 24
Ludlow v. Carman, 2 Hilt. 107.....18, 106, 110
Lumpkin v. Knapp, 5 Heiek. 555.....
Lynch v. Fallon, 11 R. I. 311..... 31

M.

Maddux v. Bevan, 30 Md. 485..... 55
Mangum v. Bell, 20 La. Ann. 215..... 55
Mann v. Richardson, 66 Ill. 481..... 92
Mathewe v. Light, 32 Me. 305..... 25
Mathieson v. Davis, 2 Coldw. 443.....
Mayo v. Dwight, 82 Penn. St. 402..... 65
McAlpin v. Cassiday, 17 Tex. 449..... 7
McArtee v. Egart, 13 Ill. 242..... 62
McCracken v. San Francisco, 16 Cal. 591..... 57
McCloskey v. McCormick, 44 Ill. 336..... 62
McCarty v. Rogers, 21 Wis. 197..... 86
McClellan v. Parker, 27 Ib. 62..... 91
McClave v. Paine, 41 How. Pr. 140..... 121
McCoy v. Williams, 1 Gilm. 584..... 42
McGrubben v. Graham, 4 Kane. 397..... 102
McDonald v. Fithian, 1 Gilm. 269..... 24
—— v. Lord, 26 How. Pr. 404..... 118
McEwan v. Kerfoot, 37 Ill. 530.....44, 118
McGavick v. Woodlief, 20 How. 221..... 109
McGovern v. Wooley, 20 S. C. 22..... 118
McKinley v. Irvine, 13 Ala. 681..... 25
McLean v. Wilson, 3 Scam. 50..... 99
McMahon v. McGrow, 26 Wis. 614..... 26
Meadows v. Smith, 12 Ired. L. 18..... 90
Mears' Exrs v. Morrison, Presse 223..... 96
Meech v. Smith, 7 Wend. 315.....90, 91
Meeker v. York, 13 La. Ann. 18..... 24
Mer. Nat. Bank v. Sells, 3 Mo. App. 85..... 70

PAGE
Merrick's Estate, 2 Ashm. 485 94
Merrill v. Wilson, 6 Ind. 426 91
Merry v. Lynch, 68 Me. 94 48
Merryman v. Davis, 31 Ill. 404 ..... 12, 24
Merwin v. Arbuckle, 81 Ill. 501 70
Metrop. Bank v. Godfrey, 23 Ill. 579 62
Meyer v. Hanchett, 39 Wis. 419 31
—— v. Simmons, 19 La. Ann. 370 54
—— v. King, 29 La. Ann. 567 ..... 43, 87, 95
Middletown v. Fonda, 25 Cal. 76 109
Millikin v. Jones, 77 Ill. 352 91
Mills v. Bank, 3 Pere Williams 453 40
Minor v. Willoughby, 3 Minn. 225 100
Mitchell v. Deeds, 49 Ill. 416 ..... 69, 70
Minor v. Waupin, 3 T. B. Monr. 185 37
Mooney v. Elder, 56 N. Y. 238 ..... 118, 124
Moore v. Moore, 5 N. Y. 256 25
—— v. Mandlebaum, 8 Mich. 433 25
—— v. Wilson, 6 Foster, 335 ..... 90, 93
Morehouse v. Yeager, 41 N. Y. Sup. Ct. 135 71
Morgan v. Mason, 4 E. D. Smith, 636 109
Morris v. Watson, 15 Minn. 212 40
—— v. Ruddy, 20 N. J. Eq. 236 10
Morrison v. Koch, 32 Wis. 254 70
—— v. Thompson, L. R. 9 Q. B. 480 31
—— v. Ogdensburgh, etc. R. R. Co. 52 Barb. 173 118
Morton v. Smith, 86 Ill. 117 ..... 61, 62
Moses v. Bierling, 31 N. Y. 462 ..... 20, 115, 124
Mott v. Smith, 16 Cal. 533 40
Mullen v. Kartzleib, 7 Bush. 253 30
Murphy v. Ottenheimer, 84 Ill. 39 ..... 11, 50
Murray v. Carothers, 1 Metc. 71 ..... 86, 91, 92

N.

Neeles v. Anderson, 2 Strobh. Eq. 262 27
Nelson v. Taylor, 40 How. Pr. 355 68
Nesbit v. Helser, 49 Mo. 383 ..... 111, 113
Nevins v. Dunlap, 33 N. Y. 676 66
Newell v. Hurlbut, 2 Vt. 351 55

PAGE
Newhall v. Pierce, 115 Mass. 457 118
N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co. 14 N. Y. 85 125
Nixon v. Palmer, 8 N. Y. 398 10
—— v. Hyserott, 5 Johns. 58 39
Noe v. Gregory, 7 Daly 283 89
Noelting v. Wright, 72 Ill. 390 70
Norris v. Taylor, 49 Ill. 17 26

O.

Oelrichs v. Ford, 21 Md. 489 .....
Ogden v. Raymond, 22 Conn. 379 ..... 90, 91, 92
O'Sullivan v. Roberts, 42 N. Y. Sup. Ct. 282 ..... 16, 18
Owings v. Hall, 9 Pet. 607 57

P.

Page v. Cooper, 16 Bevan 396 40
Pallman v. Stark, 1 Oreg. 115 55
Parish v. Kooms, 1 Para. Sel. Com. 79 36
Parsons on Contracts..9, 11, 33, 39, 47, 51, 56, 58, 68, 74, 79, 83, 103
Patten v. Patten, 75 Ill. 446 118
Pearson v. Mason, 120 Mass. 53 125
Peabody v. Hoard, 46 Ill. 242 ..... 35, 51
Peine v. Weber, 47 Ill. 41 9
Pepper v. George, 51 Ala. 190 28
Perkins v. Hadsell, 50 Ill. 216 19
Peters v Farnsworth, 15 Vt. 155 39
Petrish v. Ford, 21 Md. 489 94
Phelan v. Gardner, 43 Cal. 306 113
Phillpot v. Taylor, 75 Ill. 309 68
Pierce v. Thomas, 4 E. D. Smith, 354 ..... 28, 105
—— v. Johnson, 34 Conn. 274 91
—— v. Powell, 67 Ill. 323 110
Pittsburgh, etc. R. R. Co. v. Gazzau, 32 Penn. St. 340 57
Platt v. Patterson, 7 Phil. 135 111
Plumb v. Milk, 19 Barb. 71 ..... 85, 92
Pollock v. Cohen, 32 Ohio St. 514 56
Potts v. Aechtermacht, 9 Reporter 721 139
Powell v. Finch, 5 Yerg. 446 90
—— v. Gossom, 18 B. Monr. 179 55

PAGE
Power v. Kane, 5 Wis. 265 108
Prescott v. Hawkins, 16 N. H. 122 67
Prickett v. Badger, 1 J. Scott N. S. 296 113
Pringle v. Spaulding, 53 Barb. 17 36
—— v. Dunn, 37 Wis. 449 28
Proudfoot v. Wightman, 78 Ill. 553 ..... 35, 36, 51, 83
Pugeley v. Murray, 4 E. D. Smith 245 28

R.

Raisin v. Clark, 41 Md. 158 28
Rathbon v. Budlong, 15 Johns. 1 .....
Redfield v. Tegg, 38 N. Y. 212 ..... 109, 110
Reed v. Latham, 40 Conn. 452 44
Reed v Spruance, 45 Ill. 308 ..... 16, 18, 106
Reese v. Medlock, 27 Tex. 120 38
Rev. Statutes Ill. 1874 42
Rice v. Wood, 113 Mass. 133 31
—— v. Tavernier, 8 Me. 248 38
—— v. McLarren, 42 Me. 157 55
Righter v. Rolles, 31 Ark 170 68
Riley v. Minor, 29 Mo. 439 9
Ringo v. Binns, 10 Pet. 269 26
Robertson v. Cloud, 47 Miss. 208 50
—— v. Walker, 51 Ala. 484 66
Roberts v. Bratton, 14 Vt. 192 90
—— v. Hughes, 81 Ill. 130 71
Robbins v. Butler, 24 Ill. 428 ..... 95, 100
R. I. & St. L. R. Co. v. Shamick, 65 Ill. 223 95
Rockwell v. Newton, 44 Conn. 333 117
Rogers v. Lockett, 28 Ark. 290 26
Rounsavelle v. Pease, 45 Wis. 506 79
Rowe v. Stevens, 53 N. Y. 621 29
Royce v. Allen, 28 Vt. 234 ..... 90, 91
Rubridge v. Parks, 48 Cal. 215 27
Ruckman v. Burgholz, 37 N. J. L. 25, 127
Ruggles v. Wash Co., 3 Mo. 496 55
Ruiz v. Norton, 4 Cal. 355 94
Rupp v. Sampson, 82 Mass. 398 30
Russell v. Russell, 36 N. Y. 581 40
Rutenberg v. Nain, 47 Cal. 213 35

S.

PAGE
Saddle v. Evans, 4 Burr. 1984 103
Safford v. Grout, 120 Mass. 20 68
Salmon v. Hoffmann, 2 Cal. 138 41
Sanford v. Handy, 23 Wend. 260 7
Sassdorff v. Schmidt, 55 N. Y. 319 119
Savage v. Rix, 9 N. H. 263 93
Sayre v. Nichols, 5 Cal. 487 ..... 90, 97
Schisler v. Van Dyke, 9 Law Rep. 657 56
Scholwell v. McKown, 5 N. J. L. 828 90
Schwartz v. Yearby, 31 Md. 270 ..... 31, 108, 109, 120
Scribner v. Collar, 40 Mich. 375 30
Seago v. Martin, 6 Heisk. 308 55
Seavern v. Coburn, 10 Cush. 324 97
Seagar v. Edwards, 11 Leigh. 213 25
Selma, etc. R. R. Co. v. Anderson, 56 Miss. 829 68
Seymour v. Wyckoff, 10 N. Y. 213 57
Shackelton v. Lawrence, 65 Ill. 175 ..... 70, 71
Shannon v. Marmaduke, 14 Tex. 247 25
Shaw v. Nudd, 8 Pick. 9 55
Sheffield v. Ladne, 16 Minn. 388 82
Sheldon v. Dunlap, 16 N. J. L. 245 93
Shepherd v. Hedden, 29 N. J. L. 234 ..... 18, 106, 120
Sherman v. N. Y. C. R. R. Co., 22 Barb. 239 92
Shipherd v. Underwood, 55 Ill. 475 103
Shirland v. Mon. Iron Wks. 3 Law & Eq. Rep. 272 31
Short v. Millard, 68 Ill. 292 30
Seigel v. Gould, 7 Lans. 177 31
Simonson v. Kissick, 4 Daly 143 124
Simpson v. Lamb, 84 Eng. C. L. 603 118
Sims v. Klein, Breese 234 69
—— v. Ferrill, 45 Ga. 585 69
Sinclair v. Jackson, 8 Cow. 585 90
Skinner v. Dayton, 5 Johns. Ch. 351 10
Small v. Owings, 1 Md. Ch. 363 9
Smith v. Alexander, 31 Mo. 193 95
—— v. Morse, 9 Wall. 76 96
—— v. Smith, 1 Sweeney 552 113

PAGE
Smout v. Illberry, 10 Mees. & Wels. 1.....82, 88, 89
Sparks v. Pittman, 51 Miss. 511..... 66
Spofford v. Hobbs, 29 Me. 148..... 37
Stabler v. Cowman, 7 Gill & J. 284..... 99
Stackpole v. Arnold, 11 Mass. 27.....9, 97
Starr v. Moulton, 97 Ill. 525..... 40
State v. Chase, 3 Harr. & J. 182..... 118
—— v. Spartanburgh, etc. R. R. Co. 8 S. C. 129..... 58
—— v. Allen, 43 Ill. 456.....44, 45
St. Louis, etc. Packet Co. v. Parker, 59 Ill. 23.....10, 74
St. Louis, etc. R. R. Co. v. Rice, 85 Ill. 406.....69, 70
Stewart v. Mather, 32 Wis. 344.....31, 110
Stein v. Kendall, 1 Bradw. 103..... 57
Stillman v Mitchell, 2 Robt. 523.....50, 115
Stitt v. Little, 63 N. Y. 426..... 70
Stockbridge v. W. Stockbridge, 14 Mass. 261..... 55
Stone v. Wood, 7 Cow. 453..... 96
Story on Agency, 6, 7, 10, 32, 33, 36, 39, 44, 51, 56, 58, 72, 75, 81, 82, 85, 88, 91, 93, 95, 96, 100, 103, 104
Story's Eq. Jur.....21, 61, 62, 63, 65, 72
Stowell v. Eldred, 39 Wis. 614.....100
Stroughill v. Anstey, 16 Jurist 671..... 40
Sturdevant v. Pike, 1 Ind. 277..... 25
Sugden v. Powers..... 12
Sullivan v. Davis, 4 Cal. 291..... 36
Symes v. Hutley, 2 L. T. (N. S.) 509..... 77

T.

Taft v. Brewster, 4 Johns. 334..... 97
Taggart v. Stanberry, 2 McLean, 543..... 39
Taintor v. Pendergrast, 3 Hill 72..... 94
Tallman v. Franklin, 14 N. Y. 584..... 36
Tasker v. Bartlett, 5 Cush. 359..... 98
Taylor v. Merrill, 55 Ill. 52.....34, 35
—— v. Galloway, 1 Ohio 232..... 40
—— v. Shelton, 30 Conn. 132..... 93
—— v. Little, 26 Ohio St. 428..... 70
Thomson v. Davenport, 2 Sm. L. Cas. 359.....82, 85, 90, 94
Tifts v. York, 10 Cush. 395..... 92

PAGE
Tinges v. Mosb, 25 Mo. 480 117
Titus v. Kyle, 10 Ohio 444 90
Tombs v. Alexander, 101 Mass. 255 123
Tone v. Wilson, 81 Ill. 529 69
Topham v. Roche, 2 Hill (S. C.) 307 33
Topping v. Healey, 3 F. & F. 325 .....
Toudro v. Cushman 5 Wis. 279 39
Tower v. O'Neil, 66 Penn. St. 332 128
Towle v. Leavitt, 3 Foster 360 12
Townsend v. Hubbard, 4 Hill. 351 97
—— v. Corning, 23 Wend. 435 97
Trudo v. Anderson, 10 Mich. 357 40
Tuck v. Downing 76 Ill. 71 ..... 61, 63, 70, 71
Turner v. Harvey, Jacob 178 64
Tyler v. Paro, 52 Mo. 249 113

U.

Uhlich v. Muhlke, 61 Ill. 499 27
Uphoff v Ulrich, 2 Bradw. 399 ..... 115, 122
Utica Ins. Co. v. Toledo Ins. Co. 17 Barb. 132 31

V.

Valentine v. Piper, 22 Pick. 85 .....
Vanada v. Hopkins, 1 J. J. Marsh 293 ..... 36, 39, 42, 45
Vanderpool v. Kearns, 2 E. D. Smith, 170 31
Van Lien v. Byrnes, 1 Hilt. 133 ..... 94, 114, 115
Vielie v. Osgood, 8 Barb 132 79
Vreeland v. Vetterlein, 33 N. J. L. 247 117
—— v. Bramhall, 28 N. J. Eq. 85 67

W.

Wain v. Walters, 2 Sm. Lead. Cas. 307 79
Walker v. Osgood, 98 Mass. 348 30
—— v. Mobile R. R. Co. 34 Miss. 245 55
—— v. Bk. State of N. Y. 5 Seld. 582 ..... 82, 84, 90, 92
—— v. Tirrell, 101 Mass. 257 109
—— v. Carrington, 74 Ill. 446 27
—— v. Denison, 86 Ill. 142 48
Walsh v. Hartf. Fire Ins. Co. 73 N. Y. 5 ..... 5, 74
Ward v. Lawrence, 79 Ill. 295 109

PAGE
—— v. Fletcher, 124 Mass. 224..... 122
Warren v. Doolittle, 61 Ill. 171..... 71
—— v. Dickson, 27 Ill. 115..... 91
Watkins v. Consall, 1 E. D. Smith 65..... 28
Watson v. McComb, 1 Hill 111..... 40
—— v. Sherman, 84 Ill. 263.....9, 100
Watterson v. Rogers, 21 Kans. 529..... 56
Weisinger v. Wheeler, 14 Wis. 101 55
Wheeler v. Reed, 36 Ill. 81..... 91
—— v. Knaggs, 3 Ohio 169..... 128
—— v. Nevine, 34 Me. 54..... 41
—— v. Randall, 48 Ill. 182 70
Wheelock v. Hicks, 75 Ill. 460.....127, 129
White v. Madison, 26 N. Y. 117..... 90
—— v. Watkins, 23 Ill. 480.....69, 70
—— v. Sutherland, 64 Ill. 181..... 70
Whitney v. Martin, 6 Abb. (N. Y.) 72. 41
Wicker v. Boynton, 83 Ill. 545..... 92
Widner v. Lane, 14 Mich. 124..... 55
Wierich v. De Zoze, 2 Gilm. 385..... 69
Wiggleson v. Dallison, Sm. L. Cas. 598..... 33
Wiloox v. Routh, 17 Mass. 476..... 33
Wilkinson v. Churchill, 114 Mass. 184..... 53
Wilks v. Back, 2 East R. 142..... 96
Will v. Carley, 15 N. Y. 636..... 68
Williams v. Wood, 16 Md. 220..... 12
—— v. Mitchell, 17 Mass. 98.....33, 54
—— v. Merritt, 23 Ill. 623..... 55
Wilson v. Troup, 7 Johns. Ch. 25..... 37
Winter v. Bandel, 30 Ark. 362..... 68
Wood v. Auburn, etc. R. R. Co. 9 N. Y. 160 .....41, 100
Woodbury v. Larned, 5 Minn. 339..... 57
Woodruff v. McGehee, 30 Ga. 158..... 94
Woods v. Stephen, 46 Mo. 555..... 111
Workman v. Cuthrie, 20 Penn. St. 495..... 54
Worrall v. Munn, 1 Seld 29..... 41
Wylie v. Marine Nat. Bk. 61 N. Y. 415..... 121

Y.

PAGE
Yazel v. Palmer, 88 Ill. 597 89
Yerby v. Grigsby, 9 Leigh. 387 36
Young v. Wright, 4 Wis. 144 11
—— v. Hunter 2 Seld. 204 115

Z.

Zane v. Kennedy, 73 Penn. St. 182 40
Zeigler v. Hughes, 55 Ill. 288 24

INDEX.

PAGE

ABANDONMENT—
- by agent of the agency..... 52
- what amounts to..... 54
- effect of.....47, 105

ADVANCES—
- made by agent on account of deposit..... 104

ADVERSE INTEREST—
- agent cannot have 6

AGENCY—
- different kinds of..... 6, 7
- what is a general..... 6
- what is a special..... 6
- powers in general and special distinguished..... 9
- powers common to both kinds.....7, 11
- how it may be constituted..... 8
- who may be parties to..... 5
- how it may be terminated or dissolved....46 *et post*
  - by expiration of time..... 46
  - by accomplishment of its purpose..... 46
  - by acts of the agent..... 46
  - by change in his condition..... 46
  - by acts of the principal.....44, 47, 49
  - by change in his condition or estate..... 47
  - by operation of law..... 48

PAGE

AGENCY—*Continued.*

when revocation takes effect..... 50
how revocation may be made..... 50
when agency cannot be revoked.....47, 48
presumption as to continuance of..... 51
acts performed after its determination..... 11
where authority is in writing..... 10

AGENT—

different kinds of..... 6, 7
difference between general and special..... 9
rights and powers peculiar to each..... 9
rights and powers common to both.....7, 10, 73
brokers, factors, attorneys, etc., are agents..... 7
who may and who may not be an agent..... 6
mode of his appointment or employment.....8, 15
his relation to his principal one of trust and confidence.....12, 21, 24
he cannot have an interest adverse to his principal..... 6
cannot be principal and agent at same time....6, 25
cannot buy his principal's property.....25, 128
cannot sell his own property to his principal.... 25
qualification of these rules 26
must account for any excess received..... 24
cannot generally act for both buyer and seller. 28
qualification of this rule..... 30
representations of as affecting his principal..... 59
notice to, effect of as to principal..... 28
where two or more are appointed.....11, 19
where agency is exclusive..... 19
effect of sale by one of two or more agents.... 19

PAGE

AGENT—*Continued.*

duty of, in securing purchaser..... 21
when entitled to his commission 23
where principal pays none of the consideration. 27
when he can or cannot delegate his authority... 12
authority of, when implied..... 33
effect of want of written authority in Illinois... 42
liability of to third persons.....
on contracts in his own name..... 94
where he has no authority.....85, 88
on written contracts..... 94
commissions (*vide* commissions).....
on contract under seal.....93, 96
when not liable on contract.....85, 90, 94
on torts, for his misfeasance..... 75
not for nonfeasance..... 75
when contract is not in writing..... 80
how authority to be executed.....33, 43, 53, 95
how to execute contract..... 95
contracts of, when void as to principal..... 42
what is a good execution of his authority..... 100
when deemed a trustee for his principal..... 26
when he may employ a sub-agent..... 129
alone liable to sub-agent, ordinarily..... 129
duty of as to deposit money..... 101
his rights with reference to deposit..... 104

AGREEMENT—
as to payment of commission..... 15

ATTORNEY IN FACT—
defined..... 8
authority of limited by letter of authority..... 11
must strictly follow his instructions.....10, 33

PAGE

AUTHORITY—
measure of.....9, 11, 33
coupled with an interest..... 48
nature and extent of agents'.....9, 32
intent of the parties governs..... 32
where it is in writing the latter governs..... 33
where it is implied.....9, 33
as affected by usages of the trade.....33, 36
where agent exceeds..... 11
joint, must be jointly exercised 11
sale by one of several agents ends authority of others..... 19
to close the bargain construed..... 33
when limited to finding a purchaser..... 34
to sell land includes power to make a binding contract..... 35
exceptions to this rule..... 41
to sell and convey includes authority to receive purchase money..... 36
illustrations of what conferred by powers of attorney 36, 83
to sell and convey as including power to include covenants of general warranty..... 38
to sell does not generally include—
power to mortgage,
nor to exchange,
nor to lease.
when it must be under seal.....8, 41
cases where agency terminated..... 44
where agent exceeds, how far acts may bind his principal.....44, 45

PAGE

AUTHORITY—*Continued.*

principal may generally revoke..... 47
exceptions to this rule..... 47
principal cannot revoke when coupled with an interest 48
how it may be revoked..... 50
when revocation takes effect.. 50
presumption as to its continuance..... 51
ratification of by principal..... 54
of attorney in fact limited by the letter..... 11
cannot ordinarily be delegated..... 12
how it may be conferred.....8, 15
when necessary to be by deed.....8, 40, 57
when deed executed in presence of principal...86, 95
when not necessary to be under seal.....8, 41, 43
distinction between, and instructions..... 73
distinction between general and special..... 9
how to be executed..... 94
when to be executed in name of principal..... 95
when agent bound by mode of execution of.... 94
when execution is good *pro tanto*..... 44
when agent unnecessarily executes a sealed instrument..... 100
need not be in writing to entitle to commission..... 43

BROKER—

defined 7
real estate agent is strictly a broker..... 14

CLERK OF BROKER—

his qualifications if his employer extends to him..... 25

PAGE

COMMISSIONS—
employment of broker necessary to entitle him to.....16, 20, 104
but not necessary that contract be in writing.....43, 125
where conditioned on price being realized..... 17
where owner voluntarily accepts less price...28, 110
where agent has exclusive agency..... 19
where several agents employed..... 20
where no actual employment..... 20
where special agreement made as to.....107, 111
agent held not entitled to—
where owner refused to employ him..... 104
where he voluntarily interferes..... 106
where he has abandoned the agency..... 105
where he does not perform the whole contract.....107, 110
where property not sold at price limited.. 108
where no binding contract made..... 108
where no actual sale effected..... 108
where purchaser not accepted by owner... 112
where not the proximate cause..... 119
agent entitled to—
where he has performed whole contract.... 107
where principal has rendered negotiations fruitless.....108, 114
where owner changes his mind.....113, 114
where there is a failure in title..... 113
where owner refuses to consummate a sale.....113, 115
where agent is the procuring cause....119, 120

PAGE

COMMISSIONS—*Continued.*

where several brokers are employed 117
principal cannot dismiss broker to avoid..... 106
where express contract its terms will govern.....107, 111
where under a general employment..... 107
on exchange where agent employed to sell..... 109
agent must use good faith in finding purchaser..... 109
where owner voluntarily modifies his terms.... 110
whether the purchaser must be accepted by owner.....112, 113
agent's claim claim to, cannot be defeated—
by owner changing his mind..... 113
by failure to complete sale from fault of owner..... 113
by capricious refusal to sell..... 115
by revocation of agent's authority..... 115
where the agency is exclusive..... 115
where broker finds purchaser within time fixed.. 115
notice to owner of, broker's instrumentality.... 117
whether necessary that a binding contract of sale be made..... 123
broker's right to, not dependent on performance of contract of sale..... 126
broker need not show purchaser to be of pecuniary ability to complete contract..... 127
jury to fix compensation where no rate fixed by contract..... 127
of sub-agents..... 130

PAGE

CONTRACT—

when agent's authority to contract may be by parol and when it requires seal 9, 93
executory, for sale of land does not require seal..... .....9, 40
parol for sale of land good at common law..... 83
essentials to, within Statute of Frauds..... 76
whether agent liable for executing without written authority..... 80
ground of agent's liability upon..... .90, 94
how agent should execute..... 95
how agent may become personally liable by mode of executing..... .....94, 96
what are sealed and what are not..... 98
of employment need not be in writing.....15, 43
in Illinois, etc., agent cannot execute contract of sale of land without written authority..... 42
ratification of, by principal, how to be made.... 57
ratification of, when it releases agent..... 56
what is a ratification of.....54, 55
what is not a contract of employment..... 39
for sale of lands within Statute of Frauds..... 42
of agent after agency terminated..... 43
within Statute of Frauds..... 76
liability of agent executing without written authority..... 70
where agent supposes he has authority to execute 89
where no authority in fact..... 90
containing apt words to bind agent..... 91
unnecessarily under seal..... 100

PAGE

CONTRACT—*Continued.*

basis of right to commission..... 104
express as to rate of compensation.....17, 107
when must be performed to entitle to commission..... 107

CUSTOM OF TRADE—

effect of, as to authority of agent.....10, 35, 36, 41 86, 132

DEATH OF PRINCIPAL—

effect of on agency..... 48

DEATH OF AGENT—

effect of on agency..... 46

DECLARATIONS OF AGENT—

effect of on principal..... 72

DELEGATION OF AUTHORITY—

by agent not ordinarily admissable..... 12
benefit of rule is personal to principal 12
signing by clerk in presence of agent as..... 12

DEPOSIT—

in what manner it may be made..... 101
difference between modes of..... 101
rights of agent with respect to.....102, 104
duty of agent with respect to..... 103
when agent responsible for..... 102

DEVIATION—

from authority by agent..... 44

DISSOLUTION OF AGENCY—

by dissolution of firm of agents 46
by act of principal..... 47
by change in condition of principal..... 47

PAGE

DISSOLUTION OF AGENCY—*Continued.*
by death of agent..... 46
by accomplishment of its purpose..... 46
by expiration of its term..... 46
by death of principal..... 48
where power passes to representatives of agent. 47
where power coupled with an interest..... 48

DOUBLE EMPLOYMENT—
not in general allowable..... 28
rule and distinction applicable to.....30, 132
illustrations of.....28, 29, 30

DUTY OF AGENT—
to be diligent and exercise due care..... 12
to consult interest of his principal 21
to account for any profits or excess..... 24
to acquaint principal with facts..... 27
as to deposit..... 101
to use good faith in finding purchaser..... 109

EMPLOYMENT OF AGENT—
by principal need not be in writing..... 15
where employment is by agent of principal.... 15
is necessary to compensation..... 16
when implied.....20, 104
"I will sell" not an employment. 39
correspondence with owner not..... 40
presumption as to continuance of..... 51

EQUITY—
when it relieves against mistakes, etc..... 62
when it will not relieve.....62, 63, 64, 71
where a mistake in written contract..... 65
when not..... 66

PAGE

EQUITY—*Continued.*
will relieve against fraud..... 67
when house has been burned..... 63
as to diligence of party complaining..... 63
EXCESS OF AUTHORITY—
by agent, effect of..... 41
what is and what is not..... 45
when execution of authority good *pro tanto*... 41
FACTOR—
defined 7
FRAUD—
on broker where principal evades commission.. 18
actual and constructive defined..... 67
equity will relieve against..... 67
FRAUDS, STATUTE OF—
of Alabama, Illinois, etc..... 42
effect of as regards contract..... 42
who is an agent within..... 34
ratification within..... 57
essentials to binding contract within..... 76
object of statute as to contract..... 78
liability of agent under..... 80
contract as such unaffected by..... 83
authority of agent unaffected by..... 83
GENERAL AGENCY—
defined 6, 72
IDIOTS AND LUNATICS—
can be neither principals nor agents..... 6
IMPLIED POWERS—
of agent.....9, 33
to make a binding contract..... 35

PAGE

IMPLIED POWERS—*Continued.*
to receive purchase money....36, 38
to receive down payment.... 36
to extend time of payment.... 36
to make lease.... 37
to sell after acquired property.... 37
to sell land not previously conveyed.... 37
to determine object of purchaser.... 37
to include power of sale in mortgage.... 37
to sell on reasonable credit.... 38
to sell an undivided interest.... 38
to include covenants of general warranty.... 38
to mortgage, lease or exchange.... 40
to sign contract of the agency terminated.... 43

INDEMNITY—
when agent entitled to.... 50
when not.... 75

INFANTS—
cannot appoint an agent.... 6
can act as agent.... 6

INTEREST—
of agent must not be adverse to principal's.... 6
power coupled with.... 48

JOINT AGENTS—
must execute authority conjointly.... 11

MARRIED WOMAN—
may act as agent.... 6
when may appoint an agent.... 6

MISREPRESENTATIONS—
may be by acts and conduct.... 60
when equity will relieve against.... 62

PAGE

MISREPRESENTATION—*Continued.*

when not.....63, 69
where made innocently..... 69
must be in matters of substance..... 70
even if willful, not always ground for interference..... 71
party must have trusted to it..... 70
party must have been misled by it.....68, 70
consequences of to agent..... 74
consequences of to principal.....72, 73
principal cannot take benefit of..... 74

MISTAKES—

what equity will relieve against.....62, 64
when against mistakes in fact..... 62
when against the written instrument.....65, 66
where house was burned..... 63
where an unconscionable advantage taken..... 62
where clause designedly omitted..... 66
where honor of other party trusted..... 66
must be apparent to all minds alike..... 67

NOTICE—

when to agent binds principal..... 28
to third party where agent signs by procuration 12
to principal of double employment by agent... 29
to principal of sale by agent..... 118

POWER—

coupled with an interest... 48
of attorney, requisites of..... 8
of attorney, construed strictly.....10, 12
powers of attorney construed.....36 to 41
when agent exceeds..... 44

PAGE

PRINCIPAL—
who may be and who may not be..... 5, 6
when married women may be..... 6
right of to accept or reject purchaser.....21, 112
cannot raise capricious objections to purchaser. 23
bound by apparent authority given to agent...23, 73
when bound by agent's representations..... 72
paying no part of consideration..... 27
voluntarily reducing price..... 18
acts of agent void as to..... 44
may ordinarily determine agency at will..... 47
but not when authority is coupled with an interest..... 48
nor contrary to express stipulation for value.... 47
effect of death of, on agency..... 48
effect of insanity, bankruptcy, etc..... 49
revocation of agency by..... 50
ratification of agency by..... 54
effect of agent's representations upon.....59, 72
when liable to make compensation to third persons for agent's misrepresentations..... 74
signing contract in his presence 86, 95
right to deposit money..... 103
PROCURATION—
execution by, notice to third party..... 12
PROFITS—
made by agent belong to principal.....13, 24
qualification of this rule..... 24
PROCURING CAUSE (See Commission)—
PURCHASER—
to be acceptable to owner 21, 112

PAGE

RATIFICATION—

by principal, effect of.....54, 56, 74
what constitutes..... 55
must be to whole if to any..... 55
once made cannot be recalled..... 55
essentials of binding..... 57
of different terms than those limited..... 111

REVOCATION—

when principal may revoke agent's authority... 47
what constitutes..... 50
when it takes effect..... 50

RENUNCIATION—

by agent of the agency..... 46

SALE—

by principal, effect of.....19, 119

SEAL—

at common law..... 99
in different states..... 99
authority under, when necessary.....8, 40, 57
authority under, when not necessary.....8, 58
when instrument is under..... 98

SPECIAL AGENT—

defined..... 8
difference between, and general.....9, 72

STATUTE OF FRAUDS—

Illinois..... 42
contract when good within..... 83
authority within..... 43
effect of on agent's authority.....42, 84

PAGE

STATUTE OF FRAUDS—*Continued.*
effect of on agent's employment..... 43
does not affect right to commission..... 43
agent's liability in connection with.....80, 136

SUB-AGENT—
his rights as to principal..... 129

TORTS—
liability of agent for..... 56

TRUSTEE—
when agent is for his principal.....24, 26

USAGES OF TRADE—
as affecting construction of authority..... 33
as affecting exercise of authority.....33, 36

WARDS—
cannot appoint an agent..... 6

WARRANTY—
whether permissible on part of agent..... 38